

D7IBCAPC

Oral Argument

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

-----x

3 CAPITAL RECORDS, LLC, a  
4 Delaware limited liability  
company, et al.,,

5 Plaintiffs,

6 v.

09 CV 10101 (RA)

7 VIMEO, LLC, a Delaware  
8 limited liability company  
doing business as Vimeo.com,  
9 et al.,

Defendants.

10 -----x

11 New York, N.Y.  
12 July 18, 2013  
10:13 a.m.

13 Before:

14 HON. RONNIE ABRAMS,

15 District Judge

16 APPEARANCES

17 MITCHELL SILBERBERG & KNUPP LLP  
Attorneys for Plaintiffs  
18 RUSSELL J. FRACKMAN

19 QUINN EMANUEL URQUHART & SULLIVAN, LLP  
Attorneys for Defendants  
20 ROBERT L. RASKOPF  
21 RACHEL HERRICK KASSABIAN  
22 TODD ANTEN  
JESSICA A. ROSE

23 ALSO PRESENT:

JAMES BERKLEY, Paralegal

D7IBCAPC

Oral Argument

1 (In open court)

2 THE DEPUTY CLERK: In the matter of *Capital Records v.*  
3 *Vimeo*, Docket Number 09 Civil 10101.

4 Counsel, please state your name for the record.

5 MR. FRACKMAN: Good morning, your Honor. Russell  
6 Frackman, Mitchell Silberberg & Knupp. With me is James  
7 Berkley, a paralegal from our law firm.

8 THE COURT: Good morning.

9 MR. RASKOPF: Good morning, your Honor. Robert  
10 Raskopf from Quinn Emanuel with my colleagues, Jessica Rose,  
11 Todd Anten and Rachek Kassabian.

12 THE COURT: Good morning. We're here for oral  
13 argument on Vimeo's motion for summary judgment and plaintiffs'  
14 partial motion for summary judgment.

15 I have the morning set aside. How long do you expect  
16 your presentation to take?

17 MR. RASKOPF: I think, Judge, our presentation just  
18 straight out will be maybe 40 minutes.

19 THE COURT: I think that makes sense because it will  
20 give each of you time to respond.

21 MR. RASKOPF: All right. We'll try to keep it to 40,  
22 maybe 45 tops.

23 THE COURT: Okay. That sounds good. We've been  
24 having problems with the acoustics in the courthouse since  
25 we've returned here. So I would just encourage you to speak

D7IBCAPC

Oral Argument

1 into the microphone or at the podium, because there's a  
2 microphone there, as well.

3 MR. RASKOPF: Will do.

4 THE COURT: Okay. Why don't we start with you, with  
5 Vimeo.

6 MR. RASKOPF: Thank you, your Honor. I appreciate it.

7 So, as I said, my name is Robert Raskopf. My  
8 colleagues at the counsel table here. I would like the Court  
9 to know that also representing Vimeo in the courtroom today are  
10 Michael Cheah, Vimeo's general counsel.

11 THE COURT: Good morning.

12 MR. RASKOPF: And Ed Ferguson, who is associate  
13 general counsel of Interactive Corp.--

14 MR. FERGUSON: Good morning, your Honor --

15 MR. RASKOPF: -- which is Vimeo's parent company.

16 THE COURT: Good morning.

17 MR. RASKOPF: Your Honor, we all think Vimeo is a  
18 picture-perfect candidate for complete DMCA safe harbor  
19 protection and we plan to show you why this morning.

20 So what is Vimeo? Vimeo identifies itself as "Video  
21 and You." Vimeo hosts and enables the sharing of original,  
22 high-quality, user-generated videos. It was started by a  
23 couple of guys in a garage -- maybe not in a garage, but  
24 working part time -- in 2004, nine years ago, which is a  
25 century ago by internet standards. But Vimeo now has 12.3

D7IBCPC

Oral Argument

1 million users who upload 43,000 videos a day. Vimeo is one of  
2 the 130 most-visited websites on the entire internet.

3 THE COURT: Approximately how many employees does  
4 Vimeo have?

5 MR. RASKOPF: Vimeo now has approximately 74  
6 employees. At the time this complaint was filed in 2009, it  
7 had 20 employees.

8 There are over 31 million videos at Vimeo. I should  
9 tell the Court that Vimeo is also an award-winning website. It  
10 provides notable user tools and quality video technology.  
11 Vimeo is basically for anyone interested in video. It's the  
12 prototypical success story that Congress sought to enable when  
13 it enacted the DMCA 15 years ago.

14 Organizations like the White House, CNN, the New York  
15 Times, Yale Law School, the Metropolitan Museum, Viacom, Warner  
16 Brothers, are registered Vimeo users. You've got entertainers  
17 like Beyoncé, Van Halen, Jason Reitman. They have accounts.  
18 At Vimeo, Judge, you can see home videos, animation,  
19 documentaries, indie films, shorts, time-lapse videos.  
20 Original user-generated videos are the touchstone of the  
21 company's business.

22 So Vimeo just can't, doesn't, and isn't designed to  
23 review every video that's uploaded every day. As your Honor  
24 asked, and as I told you, we had 20 employees in 2009, when the  
25 complaint was started, filed, and we're up to 74 now. But any

D7IBCPC

Oral Argument

1 way you do the math, Vimeo doesn't work that way. It can't  
2 work that way. Basic Vimeo membership, I should tell your  
3 Honor, is free of charge. There are some enhanced services  
4 available, for example, for a fee through a Vimeo Plus  
5 membership.

6 So, Judge, what does Vimeo represent? It's an  
7 appealing product. It promotes creativity, above all else.  
8 It's an acclaimed corporate citizen. It's a clear winner in  
9 the internet space. So why is Vimeo here? Well, that is the  
10 one question I think only plaintiffs can answer. Because in  
11 this case I know that the plaintiffs' agenda is not to have  
12 clips with their music taken down expeditiously. It's not to  
13 follow the DMCA. Both before and after they filed their case  
14 against Vimeo, whenever they sent us, Vimeo, a DMCA notice, we  
15 took down the identified clips expeditiously. This is an  
16 ambush. No DMCA notice ever came. They just filed. After we  
17 got the complaint, we took down the clips anyway, just so your  
18 Honor knows.

19 Now, your Honor, there are a set or a series of  
20 requirements, sort of introductory requirements, for an ISP, an  
21 internet service provider, to qualify for DMCA safe harbor.  
22 Let me call them the structural requirements because they  
23 don't pertain directly to the clips in suit, the 199 clips in  
24 suit. In a nutshell, Judge, once DMCA's -- DMCA compliance  
25 system has to be up and running.

D7IBCPC

Oral Argument

1 My partner, Rachek Kassabian, with the Court's  
2 permission, will address DMCA's system now, but then I would  
3 return, with your Honor's permission, to just deal with the  
4 case-specific question of whether under Viacom, the Viacom  
5 decision of the Second Circuit, Vimeo had knowledge of or was  
6 willfully blind to any of the 199 clips in suit. Sneak peak,  
7 Judge: The answer is no, not a single one.

8 With the Court's permission, may I turn it over to  
9 Rachel?

10 THE COURT: Yes, absolutely.

11 MR. RASKOPF: Thank you.

12 MS. HERRICK KASSABIAN: Good morning, your Honor.  
13 Rachek Kassabian of Quinn Emanuel for Vimeo.

14 THE COURT: Good morning.

15 MS. HERRICK KASSABIAN: As the Court knows, and as my  
16 colleague, Mr. Raskopf, just alluded to, the DMCA lays out a  
17 series of requirements that all ISPs must meet in order to  
18 obtain safe harbor. We've briefed them extensively for your  
19 Honor and we believe that Vimeo satisfies them all.

20 With your permission, your Honor, we'd like to hand up  
21 a small binder with a few demonstratives in it for your  
22 reference and convenience. We've shared them with opposing  
23 counsel about 20 minutes ago.

24 May we approach?

25 THE COURT: Yes, you may.

D7IBCPC

Oral Argument

1 MS. HERRICK KASSABIAN: Thank you.

2 THE COURT: Thank you.

3 MS. HERRICK KASSABIAN: So, your Honor, at Tab 1  
4 you'll just find a nice, handy list of the prerequisites for  
5 safe harbor, but I'd like to tick through and demonstrate  
6 Vimeo's satisfaction of each.

7 First, of course, you have to be a service provider to  
8 claim safe harbor, and Vimeo is. The plaintiffs don't dispute  
9 that. In fact, on the very first page of their brief, they  
10 call Vimeo a service provider.

11 Next, of course, you have to have a registered agent  
12 for receiving notices and a working DMCA notification system.  
13 It is undisputed that Vimeo has both of those things. And I  
14 would refer the Court to paragraph 31 of our statement of  
15 undisputed facts, where those facts are not in dispute in this  
16 case. Vimeo has had a registered agent for more than seven  
17 years, and Vimeo's policies and procedures for complying with  
18 the DMCA are all laid out in its on-line terms of service.

19 Next, you have to have adopted and reasonably  
20 implemented a repeat infringer policy. And Vimeo has done  
21 that. By that what I mean is Vimeo terminates the accounts of  
22 users whose uploaded videos have been the subject of multiple  
23 DMCA notices.

24 THE COURT: Can we actually talk about this for a  
25 minute? In your view, what's the relevant date for determining

D7IBCPC

Oral Argument

1 whether Vimeo had an adequate repeat infringer policy?

2 MS. HERRICK KASSABIAN: Well, your Honor, the closest  
3 authority we have found for that is the *Wolk v. Kodak* case from  
4 this district last year, which basically looked at the time  
5 period in which a DMCA complaint, or rather notice, was sent to  
6 the service provider. And the Court looked, at that time  
7 frame, what was the status of the repeat infringer policy?

8 So here, of course, we don't have the benefit of  
9 having ever received a DMCA notice from the plaintiffs  
10 regarding the 199 videos in suit. The closest thing we have is  
11 the complaint itself. So it's our position that that's the  
12 relevant time period. You look to when we received some form  
13 of notice. A complaint is not a compliant DMCA notice, as  
14 cases like *Perfect Ten v. Amazon* have held, but that's the  
15 closest thing we have here to a DMCA notice. So that would be  
16 December of 2009.

17 THE COURT: I should just ask, what evidence is  
18 there that Vimeo had adopted a repeat infringer policy prior to  
19 2008?

20 MS. HERRICK KASSABIAN: That would be in the Cheah  
21 declaration, your Honor. And let me grab my list of  
22 exhibits.

23 THE COURT: Sure. Just while you're getting that, the  
24 Purgatory tool was implemented in November of 2008. Is that  
25 right?



D7IBCPC

Oral Argument

1 MS. HERRICK KASSABIAN: That's right. So Purgatory  
2 basically automated the process on a larger scale because at  
3 that point, by the fall of 2008, Vimeo was receiving more DMCA  
4 notices. Obviously its service was growing, it was becoming  
5 more popular. So it chose to automate the process and  
6 implement a software program to help it track repeat  
7 infringers. Before that-- and, your Honor, that's the  
8 Supplemental Cheah Declaration Exhibit 4 that talks about  
9 before that.

10 So before Purgatory was implemented, the record is  
11 undisputed that Vimeo was receiving roughly five or less DMCA  
12 notices per month. That's about one e-mail a week. So in that  
13 earlier time period, what Vimeo did was tracked repeat  
14 infringers manually. And typically Vimeo would actually  
15 terminate accounts after receiving only a single or maybe two  
16 notices. One or two strikes, in other words, was often  
17 sufficient to terminate an account back in those early days.

18 THE COURT: Is there any documentary evidence of that?

19 MS. HERRICK KASSABIAN: Yes.

20 THE COURT: I see you're turning to Exhibit 4.

21 MS. HERRICK KASSABIAN: Yes. Exhibit 4 shows examples  
22 of user accounts that were terminated by Vimeo under the repeat  
23 infringer policy before November of 2008, when the process  
24 became more automated.

25 THE COURT: Okay. And let me just ask you one more

D7IBCPC

Oral Argument

1 question. When did Vimeo start using rap sheets?

2 MS. HERRICK KASSABIAN: Sorry. I just wanted to make  
3 sure I made that clear on the record. It's the Supplemental  
4 Cheah Declaration at Exhibit 4 that has the pre-November 2008  
5 examples of terminations of accounts.

6 THE COURT: Okay.

7 MS. HERRICK KASSABIAN: The rap sheet was implemented  
8 right around the same time, in the fall of 2008.

9 So Vimeo has terminated thousands of accounts over the  
10 years, many of which were terminated for specifically violating  
11 Vimeo's repeat infringer policy. And Vimeo does more than  
12 simply terminate accounts. It actually goes above and beyond  
13 what the DMCA requires in at least two ways: When an account  
14 is terminated, Vimeo tracks that e-mail address and makes sure  
15 that a new account is not opened with that same e-mail address.  
16 It's not a requirement, but Vimeo does it. Vimeo also uses  
17 software technology to make sure that the same file, video  
18 file, that was blocked as a result of a DMCA notice is not  
19 simply reuploaded again in a different account by a different  
20 user.

21 Now, on this issue, EMI tries to manufacture some  
22 dispute by saying, Well, we don't like the manner in which  
23 you've implemented your policy. We don't like the fact that if  
24 multiple DMCA notices can come in within the space of a  
25 three-day period, you count that as a single strike.

D7IBCPC

Oral Argument

1 Well, that's an immaterial quibble with our policy  
2 because, as we know, Congress left it to ISPs to define the  
3 precise contours of their policies based on what makes business  
4 sense as long as the letter and spirit of the repeat infringer  
5 policy requirement was implemented. And we know this not just  
6 from Congress, but also from the Viacom decision, where a very  
7 similar argument was made by Viacom regarding YouTube's policy.

8 So YouTube also has a policy of considering multiple  
9 notices received within a certain time frame as a single strike  
10 for purposes of tracking repeat infringers. And the Court  
11 rejected Viacom's argument and found that policy reasonable at  
12 page 528 of the first district court decision in Viacom.

13 So the bottom line here is that reasonable  
14 implementation is what's required and that's what Vimeo has  
15 done. There are no dispute on the material facts of Vimeo's  
16 repeat infringer policy.

17 If your Honor doesn't have any other questions about  
18 repeat infringer, I'm happy to move on to the next element.

19 THE COURT: You may. Thank you.

20 MS. HERRICK KASSABIAN: So, finally, Vimeo has to not  
21 interfere with standard technical measures used by rights  
22 holders. This is an easy one because no statute and no Court  
23 has ever defined or identified any agreed-upon standard  
24 technical measure. There do not appear to be any at the moment  
25 in the law that have to be observed.

D7IBCPC

Oral Argument

1           And certainly in the briefing plaintiffs have not  
2 identified any candidates either. All they point to is the  
3 fact that Vimeo users have the options of making their videos  
4 private. They argue that somehow that's an interference with  
5 standard technical measures, but it's not. There's no  
6 authority holding that a privacy feature offered to website  
7 users would automatically disqualify you as an ISP from seeking  
8 safe harbor. It doesn't make any sense. In fact, there are  
9 many, many video websites that offer such a privacy feature for  
10 users. It's not an interference with the standard technical  
11 measure.

12           THE COURT: Does that make it harder for them if they  
13 go on Vimeo to find potentially infringing videos?

14           MS. HERRICK KASSABIAN: Your Honor, if a video is  
15 marked private, it can only be viewed by the account holders  
16 who have authorization and anyone they choose to share it with.  
17 So if it's not shared with a copyright holder, they would not  
18 see it, nor would anyone else.

19           THE COURT: Right. So if they went on Vimeo and they  
20 did a search for Let It Be or some other song, and there were  
21 some videos that had the song Let It Be on it that were  
22 password protected, those videos would not come up in that  
23 search.

24           MS. HERRICK KASSABIAN: That's exactly right. And we  
25 know from the *Viacom* Second Circuit decision that offering or

D7IBCAPC

Oral Argument

1 limiting access to user tools, such as in the *Viacom* case  
2 content I.D. tools, does not constitute interference with  
3 standard technical measures. And that's at page 41 of the  
4 Second Circuit decision. So that issue has already been  
5 decided in this circuit.

6 And the *Wolk v. Kodak* case found very similarly.  
7 There, there was a photo editing feature that the plaintiff was  
8 claiming allowed users -- not the service, but users -- to, if  
9 they wanted, to take off copyright watermarks. Obviously the  
10 editing tool could be used for any number of things and that  
11 was one of the things that the plaintiffs said constituted an  
12 interference with the standard technical measure.

13 And *Wolk*, just like the Second Circuit in *Viacom* said,  
14 no, offering user tools like that is not an interference. And,  
15 of course, the person using that tool, if for alleged nefarious  
16 purposes, if they chose to remove a watermark would be the  
17 user, not the service.

18 So those two decisions have rejected arguments very  
19 similar to what the plaintiffs are making here.

20 So, your Honor, having satisfied the prerequisites for  
21 safe harbor, I'd like to move on and talk about the specific  
22 requirements under Section 512(c) for safe harbor for  
23 user-generated content sites. And you'll see at Tab 2 in your  
24 binder, we've got just for a reference tool the handy checklist  
25 of requirements. And let me walk through them and tell you why

D7IBCPC

Oral Argument

1 they're all satisfied here.

2 So there's no question that Vimeo stores videos at the  
3 direction of its users. That is undisputed, and I'd refer the  
4 Court to paragraph 5 of the statement of undisputed facts.

5 Now, again, to try to create a dispute here on this  
6 record, EMI says, well, okay, fine, maybe you do store videos  
7 at the direction of users, but you also let users download  
8 those videos. So that download feature can't qualify for safe  
9 harbor. That's not stored at the direction of the user. But  
10 that argument has already been rejected at least twice.

11 We know from the *UMG v. Shelter Capital* case in the  
12 Ninth Circuit that downloading does qualify as a  
13 storage-related function because it's part of the ISP's service  
14 to facilitate access to user-uploaded materials. And we also  
15 know from the Second Circuit's *Viacom* decision that -- and I'm  
16 quoting here -- "The safe harbor extends to software functions  
17 performed for the purpose of facilitating access to user-stored  
18 material." That's at page 39 of the Second Circuit's opinion.  
19 And there functions like transcoding and playback were at  
20 issue, which *Viacom* argued was not part of storage at the  
21 direction of a user, and the Second Circuit rejected that  
22 argument. So there are no triable issues on that issue.

23 Second, Vimeo does not have the right and ability to  
24 control infringing activity on its service. It is undisputed  
25 that Vimeo cannot control what a user chooses to upload to

D7IBCPC

Oral Argument

1 Vimeo's website. And, of course, courts are clear, crystal  
2 clear, that the right or ability to take down content that  
3 might be complained about -- for instance, in a DMCA notice --  
4 after the fact, that doesn't satisfy the "right and ability to  
5 control" test. Because of course if it did, then the takedown  
6 requirements in one section of the DMCA would automatically  
7 disqualify you under the "right and ability to control" prong  
8 in another part of the DMCA.

9       *So instead the Second Circuit in Viacom said, well,*  
10 *something more is required. The service provider must exert*  
11 *"substantial influence on the activities of its users." And in*  
12 *defining what that means, the Second Circuit pointed to two*  
13 *examples. First they said, well, there's the Cybernet case out*  
14 *in California. That is the only reported decision that we're*  
15 *aware of -- and it was the one that the Viacom case pointed*  
16 *to -- where the service provider was found to have the right*  
17 *and ability to control infringement on its site. And there, of*  
18 *course, what I Cybernet was doing was it was monitoring*  
19 *prescreening and providing editing instructions and final*  
20 *approvals to each and every account holder that wanted to join*  
21 *Cybernet's Adult Check service.*

22       So that's one way you can have a right and ability to  
23 control if you're prescreening and editing and actively  
24 participating in each and every file or video uploaded to your  
25 system.

1           The other way that the Second Circuit pointed to is  
2     *Grokster*. The Court said, well, okay, if you are inducing,  
3     actively participating in, encouraging, facilitating  
4     infringement on a massive scale, à la *Grokster*, that could  
5     constitute right and ability to control in certain  
6     circumstances.

7           So here the plaintiffs have pointed to certain  
8     curating features on Vimeo and they say that's it. That's the  
9     substantial influence that the Second Circuit was talking  
10    about, but it's not. So, for instance, they say, well, Vimeo  
11    offers technical assistance and answers questions when users  
12    submit them. But, you know, offering a standard tech support  
13    desk and responding to user questions, as most websites do, at  
14    least the ones we like, does not make Vimeo in any way, shape  
15    or form an active participant in what users end up doing or not  
16    doing with whatever answers they might receive in response to  
17    their questions to tech support. But offering tech support  
18    does not, again, defeat safe harbor for ISPs.

19          THE COURT: I guess one question I have is how a  
20    service provider as big as Vimeo or YouTube would ever be found  
21    to have the right and ability to control infringing content if  
22    prescreening was always required.

23          MS. HERRICK KASSABIAN: So the Second Circuit said  
24    it's not always required. Right? It is one example of active  
25    participation. Now, in *Cybernet* it was prescreening of every



D7IBCPC

Oral Argument

1 single video-- or, sorry, every single account, but the Court  
2 also said if there is active inducement and participation in  
3 user infringements, encouragement of infringement, like there  
4 was in Grokster and similar P2P file sharing cases, the Court  
5 said that's another scenario where you could be found to have  
6 the right and ability to control.

7 But I guess what I'm saying here, your Honor, is our  
8 facts are not even anywhere in that universe. So  
9 hypothetically what facts could there be to find right and  
10 ability to control? I can imagine a number of scenarios that  
11 might fit under the Second Circuit's analysis, but we're not  
12 even close to that here so it's immaterial in terms of what  
13 could be the case. Discovery's closed. The record's closed.  
14 There's nothing even approaching inducement à la Grokster or  
15 the type of *Cybernet*-style active participation in editing and  
16 scripting and approving particular content that's going up on a  
17 site.

18 Plaintiffs also point to moderator tools. They say,  
19 well, Vimeo has these moderator tools. They allow employees to  
20 tag videos or mark videos after they've been posted. And they  
21 say, well, that's substantial influence over the content of the  
22 videos, and of course it's not. The videos have already been  
23 created by the user and uploaded by the user. Flagging it or  
24 tagging it or marking it after the fact does not in any way  
25 have any impact on the substance of the video and whether it's

D7IBCAPC

Oral Argument

1 infringing or not. But even if it did, the record is  
2 undisputed that far less than even 1 percent of all of the  
3 videos on Vimeo have ever been interacted with via a moderator  
4 tool in any way.

5 THE COURT: I don't have that chart in front of me,  
6 but of the 199, it was somewhere, I think, between 55 and 61  
7 that had been interacted with--

8 MS. HERRICK KASSABIAN: That's right.

9 THE COURT: -- in some way. Is that right?

10 MS. HERRICK KASSABIAN: That's right. Fifty-five I  
11 believe was the number.

12 THE COURT: And were any of those plaintiffs -- sorry.  
13 Give me one second.

14 (Pause)

15 THE COURT: This is one of them. I'm just looking at  
16 one that appears was not interacted with in any way. Let's  
17 take Let It Be from the Beatles just as an example. If an  
18 employee had seen that and either put on a like to it or buried  
19 it or done something else, with a song that's so well known,  
20 what, if any, obligation would you think that employee had?

21 MS. HERRICK KASSABIAN: Your Honor, I think that the  
22 mere presence of commercial music, especially a song that's 40  
23 years old, 30 years old, I do not think that that rises to the  
24 level of saying that there is some knowledge conferred and some  
25 obligation to do something about it in the absence of anything

D7IBCAPC

Oral Argument

1 else.

2 We all know that the use of commercial music or any  
3 kind of music in a video or other creative enterprise can  
4 certainly be authorized. It can be a fair use. It just might  
5 not even be something that the copyright holder cares about.  
6 It may be something that they actually like or aren't bothered  
7 by. So, no, it would not be a clear example of infringement.

8 I should also say, your Honor, that Mr. Raskopf is  
9 going to address knowledge --

10 THE COURT: Yes, I jumped around. I apologize for  
11 that. You can continue the way you were proceeding.

12 MS. HERRICK KASSABIAN: That's okay. But in terms of  
13 right and ability to control, again, moderator tools, flagging  
14 a tiny, tiny, minuscule percentage of all of the videos on  
15 Vimeo, in any way marking it, however you might-- however the  
16 plaintiffs have described it, none of that has anything to do,  
17 though, with right and ability to control, the actual creation  
18 and uploading of the content.

19 And, of course, next they say, well, Vimeo has  
20 guidelines for use of its site. So that constitutes  
21 substantial influence on the videos uploaded to the site, but  
22 that also doesn't satisfy the test. I mean, virtually every  
23 user-generated content site out there has guidelines, has  
24 rules, terms of service. We've all seen them.

25 The most recent on remand Viacom district court

D7IBCAPC

Oral Argument

1 decision by Judge Stanton just three months ago held  
2 specifically that "enforcing basic rules regarding content,  
3 such as limitations on violent, sexual or hate material" does  
4 not constitute evidence of right and ability to control. And  
5 that is at page 9 of the Westlaw citation for the remanded  
6 district court decision.

7 THE COURT: In analyzing right and ability to control,  
8 should I be looking at the total videos on Vimeo that employees  
9 interact with or only the 199?

10 MS. HERRICK KASSABIAN: Your Honor, I think that the  
11 Second Circuit opinion established that there's no specific  
12 knowledge requirement for right and ability to control. It can  
13 be more on a platformwide or sitewide basis. Either way it's  
14 not satisfied here.

15 In fact, I mean, to suggest-- I mean, the rule that  
16 the plaintiffs really take issue with here in terms of Vimeo's  
17 guidelines is they say, hey, you know, you prohibit infringing  
18 content. You encourage original context. You tell people not  
19 to upload rips and music videos. It's just ironic that that  
20 would be a term of service or a guideline that the plaintiffs  
21 would use or take issue with to try to suggest that Vimeo  
22 should be deprived of safe harbor for discouraging  
23 infringement. So that just doesn't come close to satisfying  
24 the test.

25 Instead it's clear from the thrust of the plaintiffs'

D7IBCPC

Oral Argument

1 brief is that what they're really saying is we think Vimeo has  
2 the right and ability to control because they're the next  
3 *Grokster*. That's really what they're saying here. They  
4 allege, accuse, that Vimeo induces, actively participates in  
5 user infringement of those 43,000 videos uploaded every single  
6 day on a massive and sitewide scale like a peer-to-peer  
7 file-sharing service. And nothing could be further from the  
8 truth. There is no evidence whatsoever in the record to  
9 support that accusation.

10 They say, well, okay, there's a handful of e-mails  
11 where there are some stray comments from employees that we  
12 don't like. And they say, oh, well, there's some lip dubs.  
13 There's a couple of lip dub videos where people are singing  
14 along and dancing around to a song and horsing around and they  
15 put up the video on Vimeo of a lip dub. And they say, well,  
16 you know, that kind of evidence equates to the kind of massive  
17 sitewide fostering of infringement that courts have found in  
18 the P2P file-sharing cases. And, again, it's just not a  
19 credible argument.

20 I think probably the first Viacom district court  
21 decision said it best when it said, "The *Grokster* model does  
22 not comport with that of a service provider who furnishes a  
23 platform on which its users post and access all sorts of  
24 materials as they wish." And that's at page 514 of the first  
25 district court decision. A platform that receives and

D7IBCAPC

Oral Argument

1 processes DMCA notices like Vimeo, it's not a *Grokster*. A  
2 platform that's a good internet citizen like Vimeo is not a  
3 *Grokster*.

4 You can just see the difference in the P2P cases that  
5 the plaintiff cites that they just have no application here.  
6 In *Grokster* the Court found that 90 percent of the files on  
7 that platform were infringing. In *Aimster* the Court found that  
8 *Aimster* "predicates its entire service upon furnishing a road  
9 map for users to find, copy and distribute copyrighted music."  
10 Obviously, Vimeo doesn't do anything like that.

11 This is not *Arista v. Lime Group* either, which the  
12 plaintiffs also cite, where the Court found that the LimeWire  
13 service was "overwhelmingly for infringement." The P2P cases  
14 have no application here and this argument in support of a  
15 claim that Vimeo as a platform for uploading and hosting user  
16 videos somehow falls within that paradigm just doesn't hold  
17 water. There is no right and ability to control here.

18 And, fourth, even if Vimeo could control what users  
19 choose to upload 43,000 times a day, it does not receive any  
20 direct financial benefit attributable to that infringing  
21 activity. It's undisputed that Vimeo users pay nothing to view  
22 content. It's also undisputed that the vast majority of  
23 Vimeo's revenues come in the form of subscription fees for  
24 premium accounts. And the account holders who choose to have  
25 premium accounts, they pay the same regardless of what types of

D7IBCPC

Oral Argument

1 videos they choose to create and upload to Vimeo's system. And  
2 we know from the 1998 House and Senate reports preceding the  
3 enactment of the DMCA that that sort of a content-neutral, flat  
4 service fee is not the type of direct financial benefit that  
5 Congress was talking about.

6 Now, Vimeo also receives some revenues from  
7 advertising, as described in the Mellencamp declaration. But  
8 that advertising is not contextual in that it does not depend  
9 on the type of video posted; whether the video is infringing,  
10 whether it has music, whether it doesn't. That has no impact  
11 on the advertising.

12 Same with the so-called house ads that the plaintiffs  
13 point to. They say, well, you have ads for Vimeo premium  
14 accounts on some of these pages so that must be a direct  
15 financial benefit, but it's not. There's no evidence at all in  
16 the record that any users have ever signed up for a premium  
17 account because they saw and clicked on and followed through  
18 with an ad that was displayed on a web page displaying an  
19 allegedly infringing video.

20 And, lastly, I think plaintiffs say, well, music is a  
21 draw on Vimeo, so that is a direct financial benefit. But of  
22 course they're conflating music with infringing music. Music  
23 being a draw is completely immaterial. The whole world likes  
24 music. It's not a draw-- offering music and having that  
25 attract people to your site has nothing to do with direct

D7IBCPC

Oral Argument

1 financial benefit under the DMCA. You have to show that people  
2 are coming to your site and using it and you're making money  
3 specifically because you offer a haven for infringement. And  
4 of course Vimeo doesn't and there's no record of that.

5 We also know from the 2013 Ninth Circuit Shelter  
6 Capital decision that just offering commercial music or using  
7 commercial music in videos is not the type of draw regarding  
8 infringement that the Congress was talking about regarding the  
9 financial benefit prong. So there's no evidence, no  
10 connection of any kind, between any infringement and any  
11 financial benefit that Vimeo might receive as part of its  
12 service.

13 And, finally, under the last prong of the safe harbor  
14 test you have to, as an ISP, respond expeditiously to any DMCA  
15 notice that you receive. And of course this is an easy one  
16 here because of the 199 videos in suit, not one of them was  
17 subject to a DMCA notice. Vimeo did not receive any DMCA  
18 notices regarding any of the 199 videos in suit.

19 So that means that Vimeo was not obligated to  
20 expeditiously respond to anything, but it doesn't matter  
21 because Vimeo did. Upon receiving the complaint in the middle  
22 of December of 2009, right before the holidays, Vimeo treated  
23 this lawsuit like a DMCA notice, even though there's no  
24 obligation to do that, and it expeditiously blocked all of the  
25 videos at issue in the attachments to the complaint within a



D7IBCAPC

Oral Argument

1 couple of weeks. And that is expeditious under any standard.  
2 There's no case that I'm aware of finding that a two-week  
3 processing time period for a noncompliant DMCA notice is not  
4 expeditious; or even, frankly, for a compliant one.

5 In sum, your Honor, I really appreciate the time  
6 you've given me here today to share this with you. We don't  
7 think there are any hard questions at all here. We think this  
8 is a very clean, open-and-shut case, just involving a direct  
9 application of the Second Circuit's Viacom decision to our  
10 undisputed record here.

11 We think that Vimeo's system under the DMCA is  
12 compliant, it's reasonable, and we satisfy the test. This is  
13 precisely the type of case that the DMCA was meant to apply  
14 to.

15 THE COURT: Thank you.

16 MS. HERRICK KASSABIAN: Thank you. I'd like to turn  
17 it back over to Mr. Raskopf to discuss Vimeo's lack of  
18 knowledge of the videos in suit.

19 MR. RASKOPF: Thank you, your Honor. So let's turn to  
20 those 199 clips in suit.

21 THE COURT: Yes. I'm sorry I got ahead of myself  
22 there. I apologize.

23 MR. RASKOPF: Well, you're way ahead of me, too, so  
24 I'm glad to see that.

25 We already know from Viacom that some general

D7IBCPC

Oral Argument

1 awareness that there's some infringing activity on the website  
2 can't be substituted for knowledge of a particular clip in  
3 suit. No general information addresses the knowledge  
4 requirement. Under Viacom we have three types of knowledge:  
5 Actual knowledge, red flag knowledge, and willful blindness.  
6 Again, all three types of knowledge must concern the particular  
7 clips in suit. Generalities don't matter; particulars do.  
8 This can't be disputed.

9         So what's plaintiffs' evidence of Vimeo's knowledge of  
10 the particular clips in suit? And, your Honor, in our demo  
11 binder at Tab 5 is a little aid if you would care to look at it  
12 as we move forward. And you'll immediately see that your Honor  
13 is way ahead of me, if you do, because we identified the 199  
14 clips, which is at the top, and there are only 55 clips in  
15 suit. The first 144 of the 199, the plaintiffs have brought  
16 you zero proof that Vimeo is even aware of them. Zero. No  
17 evidence at all. So under Viacom, absent any knowledge of  
18 them, these clips are safe harbored.

19         So as to the 55 where they even claim that Vimeo was  
20 aware of them, let's discuss. The best plaintiffs' evidence  
21 shows is that someone at Vimeo watched the video. Now, we  
22 dispute that the evidence shows even that. We pointed it out  
23 in our opposition and reply brief. We showed you why, on pages  
24 15 to 16 of the brief, a lot of these tools don't necessarily  
25 indicate that someone actually watched the video by a mile.

D7IBCAPC

Oral Argument

1 But let's assume arguendo that plaintiff actually  
2 proved that Vimeo watched these 55 videos. Well, that's not  
3 nearly enough to confer knowledge under Viacom. Because to  
4 lose safe harbor under Viacom, Vimeo must encounter  
5 infringement that is blatant or obvious -- not just a seemingly  
6 innocuous home video with music -- in order for infringement to  
7 be obvious. Vimeo must know a lot more about the music in the  
8 video than merely that the video exists.

9 And what I've done for your Honor is I gave you Tab 6,  
10 which I think fairly succinctly outlines the gaps in  
11 plaintiffs' case. The demonstrative is entitled "Awareness is  
12 not equal to obvious infringement."

13 So let's just run through the checklist. First, Vimeo  
14 has no know that the video contains music. Now, in some cases  
15 that means that Vimeo must have watched the video all the way  
16 to the end, because that's where the music is, or the part in  
17 the middle or some other part. But as I said, let's just go  
18 past that. Here's where they fail completely: Vimeo must know  
19 that the music is not in the public domain. Is Vimeo supposed  
20 to have in mind the public domain status of every song ever  
21 made just as it hears the music in the video? What if the  
22 person at Vimeo who's looking at the music or listening to the  
23 music in the video doesn't recognize it? Does Vimeo know the  
24 song at all?

25 It gets deeper and more difficult for plaintiff as we

D7IBCPC

Oral Argument

1 move forward. Does Vimeo know that the uploader owns the music  
2 in the video? And much of this was made in the Viacom case,  
3 the phenomenon of stealth marketing, where you have an owner of  
4 copyrighted music who wants a viewer to think that she is  
5 looking at an unauthorized copy, when in fact she's not.  
6 Stealth marketing, you know, a relatively new marketing tool,  
7 but widespread, supposedly adds appeal to the content. So how  
8 is Vimeo supposed to know if the music in a particular clip is  
9 being stealth marketed in that video?

10 Let's take another one. Vimeo must know that the  
11 uploader doesn't have a license. How is Vimeo supposed to know  
12 that?

13 THE COURT: Let me just ask you this about the entire  
14 argument you're making now.

15 MR. RASKOPF: Sure.

16 THE COURT: How could a service provider ever be found  
17 to have red flag, put aside actual knowledge, in light of the  
18 arguments you're making? What would an example of that look  
19 like?

20 MR. RASKOPF: I can give you I think a reasonable  
21 example of that, your Honor. Red flag knowledge, one that we  
22 think in which it would be fair to argue that red flag  
23 knowledge had been established, would be if Vimeo received an  
24 e-mail from a user that says, "I just uploaded to Vimeo a  
25 complete rip of a feature-length film that I didn't make at the

D7IBCPC

Oral Argument

1 following URL and I didn't have permission to do it," and that  
2 comes into Vimeo.

3 Now, those are facts that would make a reasonable  
4 person conclude that that particular video is obviously or  
5 blatantly infringing. That's the standard. So here's an  
6 example of a situation in which Vimeo could reasonably be  
7 charged with red flag knowledge. The standards are very high.  
8 That is the standard which has been set in the Viacom case, so  
9 I'm merely reciting to your Honor the law in the circuit. So  
10 you have the stealth marketing problem.

11 Now the licensing problem. How is Vimeo supposed to  
12 know whether the thing is licensed or not? And Judge Stanton  
13 weighed in on this issue in his first Viacom opinion in 2010.  
14 He said, "If an ISP can't determine if the music is licensed  
15 just by inspecting it"-- really by inspection-- "it lacks  
16 knowledge that the music is infringing."

17 Vimeo must also -- to have knowledge, to have red flag  
18 knowledge-- and every one of these -- this is a cumulative  
19 thing. Vimeo has to also know that the copyright holder  
20 actually objects to the use of the music in the videos. Again,  
21 Judge Stanton wrote about that. And it makes sense. I mean,  
22 after all, some artists think it's good business not to object  
23 to a video when their music is used in the video. It's good  
24 marketing. No problem. I don't object to that. I like it.  
25 I'm flourishing because someone else is using my music in a

D7IBCAPC

Oral Argument

1 way that doesn't hurt me at all. Perfect sense. Marketing  
2 101.

3 THE COURT: I think they would say, I imagine, that it  
4 is hurting them because that means that people aren't buying  
5 their songs on iTunes. Instead, they're getting it through  
6 Vimeo. Right?

7 MR. RASKOPF: Well, that depends on the kind of song  
8 it is and the kind of video it is. It would depend on a lot of  
9 things. But I would say not completely, Judge. And certainly  
10 some people would say that and other people would say, no, not  
11 at all. I love it that my music is being used in this little  
12 video. The point is, how is Vimeo supposed to know? It's not  
13 who's right or wrong in that particular debate. It's that we  
14 are bystanders in that debate. That's the key. We're an  
15 internet service provider.

16 Finally, Vimeo must be able to tell just by watching  
17 the video, by mere inspection, according to Judge Stanton, that  
18 the use of the music is not a fair use. Now, this can be--  
19 copyright fair use is a fairly complex area. It's, I'd say,  
20 daunting for copyright lawyers let alone lay persons. Let's  
21 not forget that the entity closest to most, if not all, of  
22 these questions that are in Tab 6 of your demo binder is the  
23 plaintiff. But they, of course, refuse to send us a DMCA  
24 notice.

25 Now, you don't have to take my word for it how

D7IBCPC

Oral Argument

1 difficult these determinations are because the very industry  
2 association that represented the plaintiffs, the Recording  
3 Industry of America, the Recording Industry Association of  
4 America, has admitted it. Believe it or not, the RIAA sent the  
5 very first DMCA notice to Vimeo, that Vimeo ever received, in  
6 April of 2006. That notice concerned eight videos. It's at  
7 Tab 8 of your exhibit binder. It's a small exchange, but I'd  
8 really like to draw your attention to the correspondence.  
9 Starting at the bottom of the chain, it's the last e-mail in  
10 your-- in Tab 8 and then we'll work our way up to the front.

11 So first e-mail is from RIAA. By the way, they come  
12 in at-- they notify you that they are antipiracy at riaa.com.  
13 So the e-mail chain starts as follows: "I am contacting you on  
14 behalf of the RIAA and its member record companies." This is  
15 the takedown notice. Now, this is 2008, Judge-- I'm sorry.  
16 2006? Okay. 2006.

17 So back in 2006, seven years ago, with the DMCA  
18 protocol being brand new to him, Vimeo's founder, Jake Lodwick,  
19 wrote back to the RIAA. That's the second e-mail. So Jake  
20 writes back. He gets a DMCA takedown notice. Get rid of these  
21 eight. You guys are infringing, whatever. And Jake writes  
22 back, "I received your notice about the removal of music video  
23 clips from Vimeo.com. I was happy to remove most of them, but  
24 the first three in your list were not actual music videos with  
25 the RIAA artists, but rather homemade music videos. Could you

D7IBCAPC

Oral Argument

1 please clarify your policy on these clips?"

2 Next e-mail. It's in yellow. I think it's  
3 highlighted in yellow, Judge.

4 THE COURT: It is. Thank you.

5 MR. RASKOPF: Okay. The next one is sort of a-- the  
6 initial stern, and probably canned, response from RIAA back to  
7 Jake: "The three videos referenced use sound recordings  
8 without permission from the copyright owner. These videos are  
9 infringing and must be removed." Standard stuff probably.  
10 Just guessing.

11 To which Jake replies-- and Jake goes back. Jake is  
12 interested. He writes back, founder of Vimeo, wants to learn  
13 the story, trying to work it out, writes back, "Has RIAA  
14 pursued legal action for this type of video in the past, using  
15 copyrighted music in the background, but with noncopyrighted  
16 video playing? I ask because this seems to open a new can of  
17 worms for you guys."

18 Final response from RIAA: "Please disregard our  
19 message relating to the following three videos," and those were  
20 the three videos that Jake brought to their attention in the  
21 first place. So not even the most knowledgeable and ardent  
22 defenders of recorded music rights, the owners themselves,  
23 claim that every video and music is infringing.

24 In sum, Judge, none of the 55 videos here raise even a  
25 plausible claim for Viacom to find knowledge because of all of



D7IBCAPC

Oral Argument

1 the questions we laid out.

2 Now, plaintiffs try to salvage 10 of the 55 clips as  
3 to which there was someone at Vimeo who may have touched it in  
4 some way. And these ten they claim -- and it's in your-- back  
5 to your Tab 5. The little chart that starts with 199 and ends  
6 with zero. We're down to the last ten. So these ten  
7 supposedly were uploaded by Vimeo employees and, therefore, not  
8 stored at the direction of the user. And for various reasons  
9 that argument also fails. First--

10 THE COURT: Can I just stop you before you get into  
11 the ones uploaded by employees?

12 MR. RASKOPF: Sure, Judge.

13 THE COURT: What relevance, in your view, is there of  
14 some of the e-mails in the record-- I'm looking at Exhibit 116  
15 and Exhibit 180, for example-- where there are questions posed?  
16 One e-mail is written to Vimeo and says, "I have noticed  
17 several people using copyrighted material on Vimeo. What do  
18 you do about this?"

19 The answer from someone at Vimeo is "Ignoring, but  
20 sharing."

21 Another e-mail, Exhibit 180, "Hey, guys, I see all the  
22 time at Vime videos, (for example lip-dub) music being used  
23 that is copyrighted. Is there any problem with this? Can I do  
24 it? Thanks."

25 Answer: "We allow it, however if the copyright holder

D7IBCAPC

Oral Argument

1 sent us a legal takedown notice, we would have to comply. Best  
2 wishes."

3 I don't need to go through all of them, but what is  
4 your response with what I should do with them?

5 MR. RASKOPF: They're totally irrelevant. Zero.  
6 Every one of those does not deal with a specific clip in suit.  
7 It must be the clip in suit under Viacom that is the subject of  
8 a discussion in order for there to be any relevance to it.  
9 That is where we are here, Judge. None of those e-mails, and  
10 there are a few, out of 23,000 documents that we produced in  
11 the case, that sort of one-on-one e-mails as opposed to what  
12 the whole website -- what people see when they visit the  
13 website completely, are relevant.

14 We have a standard response, and I think we produced  
15 something like 80 examples of it, when someone asks us about  
16 what do you do with copyright? How do you handle it? There's  
17 a standard response in the declaration of Michael Cheah at  
18 Exhibit 1. That is exactly what is ordinarily submitted.  
19 Okay. The supplemental declaration, not the original  
20 declaration.

21 But the bottom line is, Judge, that these are  
22 completely irrelevant because you need knowledge of the  
23 particular clip in suit. That's where it has to be. None of  
24 those e-mails have anything to do with the 55 that are the  
25 subject-- well, it's 199, but 144 there's nothing on them. But

D7IBCAPC

Oral Argument

1 even the 55, that I've gotten now down to 10, there's not a  
2 single connection between one of those e-mails and my clips.

3 So let's go to the --

4 THE COURT: Well, just one more question, if I can.

5 MR. RASKOPF: Sure, Judge.

6 THE COURT: Why wouldn't it be an issue for the jury,  
7 let's say looking at the 55 number, as to what exactly the  
8 knowledge was? And if Vimeo, for example, is willfully blind?  
9 I mean, why is that an issue for the jury to look at? Look,  
10 how does burying exactly work and what did they know? Why is  
11 that not a factual question for the jury?

12 MR. RASKOPF: Because all of those issues, there is no  
13 evidence whatsoever in this record -- and we have had a full  
14 record. We've had full discovery. There's no evidence in this  
15 record -- and it's plaintiffs' burden to come forward with  
16 it -- that there was any of these discussions such as, let's  
17 say, I don't want to hear about that video or, you know,  
18 anything that relates -- there's nothing that relates to the 55  
19 videos. So there is no issue of fact because it hasn't been  
20 created.

21 What we have is simply an association between one--  
22 there's no discovery on, an association-- and discovery is  
23 over. An association between one video and the video. You  
24 know, bury-- bury doesn't even mean that-- buried does not even  
25 mean that it was necessarily observed.

D7IBCAPC

Oral Argument

1 But we're past that because even if you assume that  
2 they were watched, there's no evidence that there was anything  
3 more than that they were watched in this record, and that  
4 doesn't nearly get you home under Viacom. It's just not  
5 enough-- there's no evidence. It's not a question of whether  
6 there's something out there that was observed in discovery that  
7 is before the Court. There isn't anything. They've completely  
8 chronicled everything they had in terms of what Vimeo's  
9 relationship is to the 55 videos and not one of them sheds any  
10 light on all of the questions that I put to your Honor in that  
11 demo tab for the very reason that there's no evidence.

12 THE COURT: Thank you. I'm sorry, you were starting  
13 to talk about employee evidence. I didn't mean to take you off  
14 track.

15 MR. RASKOPF: Sure, Judge.

16 So, first, of the ten remaining clips in suit, three  
17 of them were uploaded by one user named Julia Heffernan, who  
18 only later became a Vimeo employee. Long before she became  
19 employed by Vimeo. So knowledge of these videos can't be  
20 imputed to Vimeo. She wasn't employed by Vimeo when she  
21 uploaded them, so they were obviously stored at the direction  
22 of a Vimeo user at the time they were uploading.

23 Three more of the remaining ten were uploaded by  
24 people who were never Vimeo employees, Messrs. Fishel and  
25 Blumenfeld, who worked on a website called CollegeHumor that's

D7IBCAPC

Oral Argument

1 owned by Connected Ventures, but they don't work for Vimeo.

2 So those clips, those three clips, were also stored at  
3 the direction of a user. So we're really down to four videos  
4 as to which is a claim because those videos were, indeed,  
5 uploaded by users who were also video employees at the time of  
6 the upload. Those clips aren't official Vimeo videos or  
7 otherwise made at Vimeo's behest. There's zero proof in this  
8 record that Vimeo solicited them, that asked that they be made.

9 Ms. Dae Mellencamp, Vimeo's president, put in a  
10 declaration in this case saying that there are only a couple of  
11 videos that are made by Vimeo employees such as those made for  
12 the Vimeo Video School. So the four in issue here aren't about  
13 Vimeo at all. If you look at them, you'll see in a second that  
14 they're not. They're personal videos. I mean, you're not  
15 required to quit your membership in the human race or your zest  
16 for using Vimeo to upload your personal videos when you become  
17 a Vimeo staffer. You're still also a Vimeo user.

18 So I think holding otherwise would mean that Vimeo  
19 staffers would have to stop using Vimeo personally because  
20 Vimeo would become automatically responsible for their content.  
21 These employees, most, if not all, of whom were Vimeo users  
22 long before being Vimeo employees, would need to stop using the  
23 video site for their personal videos. So we are now down to  
24 zero, Judge.

25 THE COURT: When employees upload or when they do

D7IBCAPC

Oral Argument

1 anything, whether it's a like or it's called white-listing or  
2 burying or anything -- I guess I have a question of exactly how  
3 it works. The employees have a badge on it. Right? So if an  
4 employee says I like this or an employee uploads something, it  
5 will indicate that a Vimeo employee did that. Right? Because  
6 there will be a badge icon of sorts. Is that right?

7 MR. RASKOPF: Yes, your Honor.

8 THE COURT: I just wanted to make sure that I  
9 understood that.

10 MR. RASKOPF: That's all right. But, as I say, it  
11 doesn't mean that the mere fact that whatever they're doing has  
12 something next to it does not mean that they're created in  
13 their official capacity. I think all you have to do is look at  
14 the videos and you'll see that.

15 So for the sake of completeness, I'll briefly address  
16 willful blindness. Under Viacom the only other way to  
17 demonstrate knowledge is to show that Vimeo was willfully blind  
18 to obvious -- obvious -- infringement in the clips in suit.

19 And as I stated earlier under Viacom, evidence of  
20 willful blindness, like both actual and red flag knowledge,  
21 must relate to the individual clips in suit. So there's no  
22 evidence at all in this record-- I know you asked me about it,  
23 but there's no evidence at all in this record that Vimeo was  
24 willfully blind to any of the 199 clips we just addressed.  
25 They don't really make an argument to the contrary.

D7IBCPC

Oral Argument

1           Infringement --

2           THE COURT: What is the difference, really, in this  
3 context between willful blindness with the specific instance of  
4 infringement and red flag knowledge?

5           MR. RASKOPF: Sure. I gave you the example of red  
6 flag knowledge.

7           THE COURT: Right. What would an example of willful  
8 blindness in this context be?

9           MR. RASKOPF: Okay. So Vimeo gets an e-mail from a  
10 user, and the e-mail says I just uploaded to Vimeo a complete  
11 rip of a feature-length film that I didn't make and I didn't  
12 have permission to do so. Let's say that that particular user  
13 has five hundred videos in his account. So he says, Do you  
14 want me to send you the URL for the video? I just uploaded and  
15 ripped the Man of Steel. It's playing right now. I uploaded  
16 it. I don't have a right to it, but this kind of thing  
17 happens.

18           And so the user says, do you want me to send you the  
19 URL? Meaning that if that URL is submitted, then Vimeo has  
20 specific knowledge of a specific location for a specific clip.  
21 And instead of saying okay, Vimeo says, nah, don't send us the  
22 URL. We don't want to know about it. Okay? So there you have  
23 a situation in which Vimeo has deliberately avoided  
24 confirmation that a particular video is infringing in the face  
25 of facts suggesting a high probability that it is. Now, this

D7IBCAPC

Oral Argument

1 is the law. That's the law. That's what willful blindness is.

2 Red flag knowledge is facts that make a reasonable  
3 person conclude that a particular video is obviously or  
4 blatantly infringing. This is the law we have. And so we talk  
5 about the Beatles, we talk about any-- these are videos that  
6 happen to have music. And we went through the list of things  
7 that can't be known by Vimeo. And certainly none of this  
8 rises, not even close, not one of these clips rises, with the  
9 evidence that's been presented -- discovery's over, motion for  
10 summary judgment. Someone's got to raise a genuine issue of  
11 material fact as to the specific clips in suit.

12 And, your Honor, we don't believe that a single clip  
13 qualifies to go beyond this point. We think every one of these  
14 clips deserves safe harbor for the reasons that I stated at  
15 this time.

16 Thank you.

17 THE COURT: Thank you very much.

18 Mr. Frackman.

19 MR. FRACKMAN: Thank you, your Honor. If I may impose  
20 on the Court, they took my watch downstairs when I came in. So  
21 if you can give me-- is there a clock here?

22 THE COURT: Yes, there is. So I'll let you know.

23 MR. FRACKMAN: Part of the problem that I have  
24 responding is kind of the problem we had in doing our briefs.  
25 There's an embarrassment of riches here and I, frankly, don't



D7IBCPC

Oral Argument

1 know where it's best to begin, so I'll begin at the end if I  
2 may.

3 THE COURT: Sure.

4 MR. FRACKMAN: I do suggest to the Court that not only  
5 is there a lot of material and a lot of evidence recited in our  
6 briefs, but frequently what the Court will find and what I  
7 found is that some of the same materials and some of the same  
8 documents and some of the same evidence overlap these various  
9 issues and so they have to be considered in a certain extent as  
10 a whole.

11 Let me make one quick comment while it's in my head on  
12 blindness. It seems to me the inability of Mr. Raskopf to  
13 provide a reasonable, understandable example of either willful  
14 blindness or of red flag knowledge goes back to really how he  
15 ended his presentation, which is how they began this case and  
16 how they began their brief: The DMCA is a notice and takedown  
17 statute. That's what almost everything he said comes down to  
18 and that's what the Viacom case said is not the law.

19 So if you dissect -- and I'll start with willful  
20 blindness. I didn't quite understand the example, but I must  
21 say, if your policy, if your stated internal policy, is, among  
22 other things, don't ask/don't tell, then Mr. Raskopf's example  
23 disappears and there is no willful blindness under those  
24 circumstances.

25 And, indeed, your Honor, I would suggest as with

D7IBCAPC

Oral Argument

1 knowledge, as with right and ability to control, as with  
2 inducement, you end up with -- again, as Mr. Raskopf argued,  
3 you end up with just complete freedom on the part of the  
4 internet service provider no matter what it says, what it does,  
5 what it instructs, what its policy is.

6 THE COURT: So is your argument, just to clarify, that  
7 the defendant need not be willfully blind to a specific  
8 instance of infringement but to the possibility of infringement  
9 generally?

10 MR. FRACKMAN: It's neither of those, your Honor.  
11 It's somewhere beyond general knowledge because it requires  
12 something on the part of the ISP. It requires them to  
13 construct a service that is willfully blind. It doesn't mean  
14 that just with general knowledge of infringement and nothing  
15 more, but if there's infringement going on and you construct a  
16 service that makes you willfully blind-- and I would submit is  
17 intended to make you willfully blind-- then you are willfully  
18 blind to the infringement that's going on on the service.

19 Just like in Aimster, your Honor, that the person who  
20 ran the Aimster service constructed something so that he would  
21 be willfully blind to everything. He had a system set up so  
22 that he could argue plausible deniability. And the Court in  
23 Aimster, Judge Posner said, well, in those circumstances you  
24 have knowledge. And I think if you read the Viacom opinion --

25 THE COURT: Well, I was actually going to turn to

D7IBCAPC

Oral Argument

1 that. I was going to ask you how I'm supposed to read the  
2 language from the Viacom decision stating that "the willful  
3 blindness doctrine may be applied in appropriate circumstances  
4 to demonstrate knowledge or awareness of specific instances of  
5 infringement under the DMCA." What do I do with that under  
6 your theory?

7 MR. FRACKMAN: I think what you do with it, your  
8 Honor, and as I read it, and as I think the only way to read it  
9 is, after all, you can't have specific knowledge of something  
10 that you're blinding yourself to. It's just a logical  
11 inconsistency.

12 So I think what the Court is saying, and does actually  
13 say, is that willful blindness imputes knowledge, a deliberate  
14 effort to avoid guilty knowledge, imputes the necessary  
15 knowledge. And quoting from the eBay court, here's what the  
16 Second Circuit said: A service provider is not permitted  
17 willful blindness. "When it has reason to suspect that users  
18 are infringing a protected mark, it may not shield itself from  
19 learning of the particular infringing transactions."

20 And going on, quoting, "The willful blindness doctrine  
21 may be applied, in appropriate circumstances, to demonstrate  
22 knowledge or awareness of specific instances of infringement."  
23 It's implied. It's implicit. It's the penalty you pay for  
24 setting up a system where you're using copyrighted material and  
25 then you shield yourself from making a determination. You

D7IBCAPC

Oral Argument

1 don't ask; you don't tell. As Mr. Pile said, we ignore music.

2 All of these, by the way, all of these internal  
3 documents are far more important than Mr. Raskopf alluded to,  
4 and I'll get to that in a moment.

5 They set up their entire website globally and  
6 intentionally and told everybody to be willfully blind. If  
7 they hadn't been, as we pointed out in our papers, it would  
8 have been readily obvious -- and I think they admit it -- it  
9 would have been readily obvious that these were commercial  
10 recordings that could not be used without permission. They had  
11 the names of artists. They had the names of record companies.  
12 They had all the indicia of being a copyrighted commercial  
13 recording.

14 THE COURT: Do you have evidence that Vimeo was  
15 willfully blind to any of the specific videos in suit?

16 MR. FRACKMAN: The specific ones in suit?

17 THE COURT: Yes, the 199.

18 MR. FRACKMAN: The reason I can't directly answer that  
19 is because I don't see how anybody could be willfully blind to  
20 a direct-- to a specific infringement, to a specific use. It's  
21 either red flag knowledge or it's actual knowledge or, at the  
22 end of the day, you've built a system where your willful  
23 blindness demonstrates -- as the Court said, demonstrates --  
24 knowledge. It's separate, obviously, from both red flag and  
25 from actual. It's separated by the Court from both of those.

D7IBCPC

Oral Argument

1           So the answer to your Honor's question is, no, I can't  
2 point to one because I wouldn't know how to point to one. I  
3 really wouldn't. And I don't know-- I don't think Mr.  
4 Raskopf's example was an example of willful knowledge, and I  
5 don't know how anybody could point to one unless you accept  
6 what I think is the reasonable interpretation.

7           And you do have to go beyond-- you do have to go  
8 beyond generalized knowledge. You have to look at what they  
9 were doing here. You have to look at how they built their  
10 system. You have to look at how they ignored music. You have  
11 to look how they didn't put music as something that was  
12 forbidden. You have to look at they didn't flag music. You  
13 have to look at how they white-listed infringing music and made  
14 it available. You have to look at all of those things and  
15 more. You have to look at how they didn't remove stuff. You  
16 have to look at how they induced -- and we'll get to that --  
17 invited, taught.

18           THE COURT: What do you think a company like that, a  
19 service provider, that has 70-some-odd people, what should  
20 their obligation be to look into every song that, what, that  
21 they recognize? I mean, as a practical matter, what do you  
22 think they need to do?

23           MR. FRACKMAN: Well, let me take that for a moment,  
24 your Honor, because those are two different questions. Maybe  
25 they're ten different questions, actually.

D7IBCPC

Oral Argument

1           The first thing is absolutely and without a doubt if  
2 they induce infringement -- if we're talking about right and  
3 ability to control, you gave, I think, Mr. Raskopf a couple of  
4 examples of documents. And he said, well, those don't refer to  
5 clips in suit. They don't have to. They're inducement  
6 evidence. And inducement evidence does not refer, as the  
7 Viacom court was crystal clear, does not deal with specific  
8 infringements. If you induce, you're liable. And they  
9 induced. So that's number one.

10           Number two, in terms of knowledge, if I can go through  
11 it, I think there are several layers to it. Let me start with  
12 the staff. There is evidence in our reply documents that the  
13 way they wanted to characterize the ten people is just not  
14 accurate and not based on the records that we have. But  
15 leaving that aside, there's no doubt that those ten individuals  
16 made, uploaded, and appeared in infringing videos. Most of  
17 these wore a badge. They're not users. Their job  
18 responsibilities included making videos. They were frequent  
19 users. They were told to make videos to inspire other users.  
20 They didn't just create these; they uploaded them. They were  
21 identified with them. The music was identified. And it was  
22 accessible both on the website and in their profile pages.

23           So there's no way that you could disassociate those  
24 people from that material. And, clearly, they knew. They knew  
25 because when they had their depositions taken-- well, anyone

D7IBCPC

Oral Argument

1 would know, I would think, that if you copy the Beatles, you're  
2 infringing somebody's rights. But when they had their  
3 depositions taken, they, frankly, admitted how they made it.  
4 And the website teaches others how to make infringing videos,  
5 including with the step of purchasing an MP3 from iTunes, a  
6 commercial recording, and syncing it into your video.

7 I would submit there's no way to get away from those.  
8 By the way, just as an aside, Mr. Fishel was an employee of  
9 Connected Ventures. We've shown that Connected Ventures at the  
10 time owned Vimeo. Connected Ventures is a defendant in the  
11 case. A minor point, because I think all ten of those are  
12 swept under the rubric of knowledge, of actual knowledge.

13 The other ones -- and I'll work my way up to the ones  
14 where they commented or liked, which, again, was part of their  
15 job; specifically instructed to do that. In order-- and they  
16 testified in order to like something -- and it's logical, of  
17 course -- you have to see it. And when you see it, when you  
18 see these, you know. You know that they're by artists, in our  
19 case a whole laundry list of artists who clearly are commercial  
20 artists. And I won't read them to you in detail, your Honor.  
21 You have them in the exhibits to our complaint. But they  
22 include, of course, the Beatles, Fergie, Nelly, The Four Tops,  
23 Gladys Knight, The Jackson 5, Tupac. There's something for  
24 everybody there. But they're clearly commercial recordings for  
25 which there is no permission.

D7IBCAPC

Oral Argument

1           Now, let me answer a couple of questions on that, on  
2           how would we know. First of all, the issue of maybe they're  
3           licensed is a red herring. As some of the courts say, and I  
4           think most frequently in *Fung*, record companies don't go around  
5           licensing individual people to use their recordings and videos.  
6           They just don't do it.

7           Number two, if they did, it would be a license to that  
8           individual. It wouldn't be a license to Vimeo to use it on its  
9           own website in a commercial purpose, for a commercial purpose,  
10          and obviously a very lucrative one. That's what they make  
11          their money out of, those videos which they say are enhanced  
12          greatly by music.

13          THE COURT: When you say that's how they make that  
14          money, are you talking through advertising? subscriptions?

15          MR. FRACKMAN: I'm talking about several different  
16          things. If I can finish this one thought first--

17          THE COURT: Please, go ahead. Absolutely.

18          MR. FRACKMAN: -- I'll try and come back to that.

19          THE COURT: Absolutely.

20          MR. FRACKMAN: If I could make a note.

21          And, your Honor, Vimeo knows it's not licensed. It  
22          talked about gets licenses. A little bit more willful  
23          blindness there. It talked about getting licenses, but decided  
24          that they didn't want to spend the money. So the license issue  
25          I think in many ways shows the weakness of that aspect of the



D7IBCPC

Oral Argument

1 case: How would we know?

2 Fair use, the same. Fair use is a defense to an  
3 individual user. First of all, there's no evidence here that  
4 any of these constituted fair use. Second of all, this is not  
5 the time to discuss fair use. That's at the liability stage.  
6 And, third, it's not Vimeo's defense. We're talking about  
7 direct infringement by Vimeo, not secondary liability in this  
8 instance where you have to have a direct infringer. They're  
9 the direct infringer. It's not fair use.

10 And, your Honor, we quoted Professor Jane Ginsberg in  
11 our papers, who basically said -- and I think it's  
12 self-evident -- that if those arguments succeed, then no  
13 service provider can ever have knowledge because they always  
14 can say that. They've come up with another one now: Maybe  
15 it's in the public domain. Well, again, no service provider  
16 could ever be found liable.

17 My colleague pointed out to me that if you look at  
18 Mr. Pike's video, one of the ten, and he is-- I'm sorry,  
19 Mr. Pile's video; he doesn't write very well-- he's one of the  
20 ten and he was a chief development officer. It's about Vimeo.  
21 The Street Team video is about Vimeo. Some of these are  
22 directly about Vimeo and how you disassociate yourself from  
23 that. And this was-- I have to emphasize this was their job.  
24 Their job was to make music videos to inspire. Similarly,  
25 their job was to comment and like videos to inspire; to put

D7IBCPC

Oral Argument

1     them on staff channels where everybody was automatically  
2     subscribed.

3             THE COURT: But is this different from what Judge  
4     Pauley found in the MP3/TCase? I believe that he found that  
5     personal uploads of employees were personal actions that were  
6     not within the scope of employment and could not be imputed to  
7     the employer. How is this different?

8             MR. FRACKMAN: This is different, your Honor-- and I'm  
9     not sure he was talking about uploads or downloads there.  
10    That's different. I seem to recall he was talking about  
11    downloads, but I may be mistaken. If you give me a minute, I  
12    might be able to...

13            THE COURT: Sure.

14            MR. FRACKMAN: At the moment I can't locate it.

15            THE COURT: That's okay. You may proceed.

16            MR. FRACKMAN: Let me make the point that from my  
17    point, it doesn't matter. What we have here is that this was  
18    their job. This was their job. It had their badge next to it.  
19    It was on their profile page. They were instructed to do this  
20    as part of their job. And whether it happened -- although I  
21    don't think it did -- before or after, the fact of the matter  
22    is it continued to be performed after they became monitors or  
23    community members. That's an infringement. That performance  
24    is an infringement and they definitely were then part of Vimeo.

25            So if I can, just very quickly, we do have a chart

D7IBCPC

Oral Argument

1 that was submitted to the Court that basically shows of the 199  
2 works, ten were uploaded by employees, 25 were commented or  
3 liked on, and frequently when you look at these comments or  
4 likes, you can tell that they've obviously seen the material  
5 and they testified that they would have seen it in order to  
6 comment or like on it. Two are on staff channels, 20 are  
7 white-listed. Your Honor knows what white-listing means. They  
8 can't be flagged.

9 It's more evidence of willful blindness, by the way.  
10 They can white-list an entire user and it makes no difference  
11 what you put up after that. You're a good guy, as  
12 Ms. Mellencamp says. You're a good guy and you can put up  
13 whatever you want. Twenty of ours are white-listed and there's  
14 testimony that they look at stuff before they determine that  
15 someone is a good guy and can be white-listed. And four are  
16 buried where you also have to look at the material before you  
17 make that decision.

18 Then we also add to that, your Honor -- and Mr.  
19 Raskopf didn't talk to about that -- the plus subscribers.  
20 There are 30 plus subscribers. And the testimony I think from  
21 Ms. Allen was that they reviewed the accounts of plus  
22 subscribers to make sure that they are compliant.

23 And I believe there's even a M.O.D. tool for that. So  
24 we add those and we end up with 56 of direct infringement  
25 knowledge or, at the very least, because of what these

D7IBCAPC

Oral Argument

1 reportings were, red flag knowledge. There were recordings of  
2 well-known artists and well-known songs without any license or  
3 consent.

4 And, by the way, your Honor, I would point out there's  
5 not a single declaration from any of these employees that says  
6 anything about why they did it, when they did it, how they did  
7 it, whether they knew or didn't know. Nothing. And I would  
8 submit because they can't. They can't.

9 If I can get from there to -- your Honor I think did  
10 raise direct financial benefit. And our view is, as we put in  
11 our papers, is that there are several ways that there's a  
12 direct financial benefit. But the most direct way, I would  
13 think, is because there are advertisements on the very pages of  
14 our infringing recordings. And not only that, but the  
15 testimony is or the evidence is that Vimeo gets paid every time  
16 somebody goes to that page. Display advertisement. They don't  
17 even have to watch the video. They're attracted to it maybe  
18 because it says the Beatles.

19 They also have banner advertisements, little boxes,  
20 where Vimeo gets paid every time there is a click. So they get  
21 paid directly from advertising revenue on the pages that have  
22 our material.

23 In addition, those per-click advertisements are served  
24 by Google. They're AdSense advertisements. And there is  
25 testimony that they are targeted in some sense to the material

D7IBCPC

Oral Argument

1 on the website.

2 In addition, as we pointed out to the Court, there's  
3 evidence of one major sponsor, CarMax, who decided and paid  
4 Vimeo to sponsor the lip dub channel. I believe it's 20 or 30  
5 of our videos are lip dubs, as your Honor may know. CarMax  
6 advertised on pages that had infringing lip dubs and they were  
7 attracted because of the very nature of the material of lip  
8 dubs.

9 Finally, your Honor-- maybe not finally-- Vimeo  
10 decided for its own purposes to have at least two tiers of  
11 subscribers and their pro user pays more money. And they  
12 advertise for pro users right on the same pages that had our  
13 infringing videos.

14 And then, finally, we get to two other points on  
15 financial benefit. One is ever since my great-grandmother went  
16 to dance halls in the early 1900s, when music was played,  
17 infringing music was played, some infringing music was played,  
18 it was a draw. And all you have to do is look at these videos  
19 and turn down the music and you can see how important the music  
20 is. And they recognized how important the music is. It  
21 enhances; their word, I believe. It's a new type of music  
22 video is what one of the founders I think called it.

23 The draw is there. It's self-evident. It's the use  
24 of intellectual property and it brings people either to the  
25 website or permits them or makes them or encourages them to

D7IBCAPC

Oral Argument

1 stay on the website. And the amount of the resulting financial  
2 benefit is, at this stage of the game, not relevant. It's just  
3 not relevant. That's a damage issue. As long as it's a  
4 draw -- and they knew it was a draw. They said it was a draw.  
5 They encouraged it to be a draw. And as your Honor knows, the  
6 bar for direct financial benefit in the cases has been set very  
7 low. In this case we clearly, clearly, pass that bar.

8 Now, I can also point out to your Honor, as we pointed  
9 out to the Court, the term "lip dubs," which were inevitably  
10 and necessarily infringing, using commercial music -- in fact,  
11 they taught their users how to infringe by making lip dubs and  
12 encouraged them-- was one of the top, five top, referral terms  
13 from search engines. They--

14 MR. BERKLEY: Seven.

15 MR. FRACKMAN: They embedded the word "lip dub" in  
16 their meta tags, in their code, even if the video didn't apply  
17 to lip dubs because they knew people were looking for lip dubs.  
18 It was also one of the top search terms, keyword search terms,  
19 on Vimeo. And a fair amount of those lip dubs were ours, were  
20 infringing lip dubs, which kind of takes me, I think, maybe  
21 directly to the issue of inducement.

22 THE COURT: Can I just ask you a question about  
23 knowledge before you get to inducement? When I'm thinking  
24 about whether your evidence of Vimeo interacting with the  
25 videos in suit through liking or white-listing, et cetera, as

D7IBCAPC

Oral Argument

1 we talked about, am I considering in your view a question of  
2 law as to what constitutes knowledge or a question of fact that  
3 should be decided by the jury?

4 MR. FRACKMAN: I think in this instance it's a  
5 question of law because the key facts are undisputed. The key  
6 facts are undisputed. We know that these people made them. We  
7 know how they labeled them. We know they put them up. We know  
8 it was part of their job. We know it was stamped "staff," and  
9 we have evidence that it was during their employment. It  
10 doesn't matter whether it was during their employment. We know  
11 the specific videos. And based on that, they have knowledge.  
12 You know when you make one what it is and you know when you see  
13 one that identifies it. And most of these, if not all of  
14 these, have clear identification of what the music is.

15 So there really isn't anything, in my view, on those  
16 55 plus, there isn't anything that would take that away from  
17 the jury. Moreover, if you took it away from actual knowledge,  
18 it's clearly red flag knowledge. Once they look at these those  
19 videos and they see all the indicia of both what's within in  
20 the video, which is our music, and how it's described, that  
21 subject of knowledge applied to any reasonable person, the  
22 conclusion would have to be -- knowing that you don't have a  
23 license to do it, would have to be that there's red flag  
24 knowledge, or else I would submit to the Court red flag  
25 knowledge becomes pretty useless, becomes moot.

D7IBCAPC

Oral Argument

1 THE COURT: Do you have any evidence of knowledge or  
2 awareness of the other videos other than the 55, the remaining  
3 144?

4 MR. FRACKMAN: The position we have on that, yes, your  
5 Honor. Here's how I would argue this. And this is an  
6 overflow, perhaps one of those areas to willful blindness. The  
7 Vimeo people knew that music was integral to their website, to  
8 their videos. It makes a good video great, is what they said.  
9 The site really couldn't exist without music. They built the  
10 website in large part on lip dubs, on music.

11 On their face, the music is not incidental. It's  
12 throughout most of these videos. It has all of these indicia  
13 on it: Famous artists, plaintiffs' names, credits. Even  
14 several we point out to the Court are actually videos of a  
15 vinyl record that it has *Capital Records* on it. Widely known  
16 people.

17 And these people are sophisticated business people, on  
18 a business that relies on intellectual property. They protect  
19 their intellectual property. They even sell music now  
20 themselves. They even get licenses from their users, but not  
21 from us, so they knew it had to be licensed.

22 We know that these people were trolling the website.  
23 We know that they had tools to go through the website. We know  
24 at one time they were looking, they say, at every video. As  
25 that got more difficult, they developed tools to look at the



D7IBCAPC

Oral Argument

1 video. We knew they were looking at tens or hundreds or  
2 thousands or more videos because they subscribed not only to--  
3 they not only got their own, but they subscribed to channels,  
4 to users. They went on the website to see what was Vimeo-esque.  
5 They went on the website to delete material.

6 What we don't have, we don't have a declaration from  
7 any of these people saying what they saw or why they would not  
8 in the course of their exploration have seen these videos and  
9 have been able to determine through red flag knowledge that  
10 they were infringing. They know what a copyright is. They say  
11 that over and over again.

12 THE COURT: But they have no affirmative duty to  
13 monitor under Section 512(m). Right? So putting aside the  
14 ones for a minute where there was some interactions, on the  
15 other ones what's your argument?

16 MR. FRACKMAN: They have no affirmative duty to  
17 monitor, but-- and that's to monitor ab initio. Once you start  
18 to explore, filter, monitor -- in their words, police -- you  
19 can't just do it to develop your website to ignore music. And  
20 that gets really to inducement, your Honor. It gets really to  
21 inducement. But once you start monitoring for the purpose of  
22 building a specific type of website, they set out to do  
23 something here. They set out to build a website that was not  
24 YouTube. That was different. That would redefine the music  
25 video. That they would curate, curate by policing, monitoring,

D7IBCAPC

Oral Argument

1 by setting up a system and a guideline-- and this comes true  
2 over and over and over again. We want -- our website is going  
3 to be original videos. Original videos, but not original  
4 music.

5 They eschewed videos that were not original to the  
6 user, but over and over again, when they saw it, when they  
7 talked about it, when they put their guidelines up, the only  
8 time we take down music is with a DMCA notice. So we want good  
9 music for these original videos, and that's going to be our  
10 website. And they went out to do it. And the way they went  
11 out to do it, your Honor, is how they induced. It's both  
12 inducement and control under *Cybernet*.

13 The control under *Cybernet* eliminated, in large part,  
14 the videos or the users they didn't want. Inducement, on the  
15 other hand-- and these two joined together, although it's not  
16 necessary under Viacom, that you have both inducement and  
17 *Cybernet*-type control. But the inducement part of it is how  
18 they got the music. And what they did -- purposeful conduct,  
19 which is what inducement requires, exerting substantial  
20 influence on the activities of users. They wanted this user,  
21 but they didn't want to pay for it, your Honor, I should say  
22 because, as your Honor knows, they calculated what it might  
23 cost, they budgeted for it. We have 10 to 20 percent  
24 infringing music on here. Here's what the record labels are  
25 going to ask for, but they didn't want to pay it. So they

D7IBCAPC

Oral Argument

1 induced their users to do it. They broadcast a message to  
2 stimulate others to commit violations. That's a quote.

3 And they did it in the variety of means, one or two of  
4 which your Honor pointed out to Mr. Raskopf. Responses to  
5 individual users which are evidence of inducement. Hey, guys--  
6 I'm reading, your Honor, from Exhibit 180. "Hey, guys, I see  
7 all the time at vime videos" -- it's a typo, Vimeo videos --  
8 "(for example, lip dub) music being used, that is copyrighted.  
9 Is there any problem with this? Can I do it?

10 Answer from Mr. Verdugo, somebody high up in their  
11 community: "We allow it. However, if the copyright holder  
12 sent us a legal takedown notice, we would have to comply."  
13 Back to DMCA takedown. Back to the position that YouTube took  
14 originally with Judge Stanton and the position that Viacom said  
15 was absolutely wrong.

16 THE COURT: Do you know if the person who wrote this  
17 e-mail uploaded one of the 199 --

18 MR. FRACKMAN: It doesn't matter. It doesn't matter.  
19 As the Court in Viacom said, there doesn't have to be knowledge  
20 of any infringement, any specific infringement, as a result of  
21 inducement. When you induce, inducement doesn't have -- is  
22 different than the knowledge segment. When you induce  
23 infringement and you fall under the right and ability to  
24 control, you are liable for the results of that inducement.  
25 You've induced infringement. We show that there was

D7IBCAPC

Oral Argument

1 infringement. That's it. That's it. There's no specific  
2 knowledge requirement.

3 In fact, what Viacom says, "We remand to the district  
4 court to consider in the first instance whether the plaintiffs  
5 have adduced sufficient evidence to allow a reasonable jury to  
6 conclude YouTube had the right and ability to control the  
7 infringing activity and received a financial benefit." And  
8 earlier "Both of these examples" -- *Cybernet* and *Grokster*,  
9 inducement. "Both of these examples involve a service provider  
10 exerting substantial influence on the activities of users  
11 without necessarily or even frequently acquiring knowledge of  
12 specific infringing activity."

13 That's the price you pay. And we do have evidence  
14 that there was inducement of specific infringements. There's a  
15 very interesting series of-- or an e-mail string between  
16 Mr. Pile and a user. It's Exhibit 329. The user says, "I have  
17 seen you video on Vimeo (very well done) and we are jumping on  
18 the bandwagon at our company and doing one for our end of  
19 financial year party and possibly post it. Did you apply for a  
20 license to use the song?"

21 Here's what Mr. Pile says to the user: "Michelle, we  
22 don't have a license to use that song specifically, however we  
23 do pay royalties on any music played on Vimeo." Outright lie  
24 and Mr. Pile admitted that in his deposition.

25 And then what happened is Michele, the user, put up

D7IBCPC

Oral Argument

1 her video with our music on it. That's how inducement works  
2 and that's how it worked here.

3 And that wasn't the only example. There are others.  
4 There's a lip dub called Girls and Boys where I believe they  
5 said they were inspired by a lip dub that Vimeo did. So there  
6 is evidence, but you don't need it. They don't need to know  
7 about specific infringements; we don't need to know about  
8 specific infringements. I think the law is clear on that going  
9 back to *Grokster*.

10 But if I can just take a few minutes to finish up on  
11 inducement, because that's not the only way they induced.  
12 That's not the only way they induced. Their own infringements  
13 were inducing. Probably the most inducing evidence you can  
14 find and probably unique to Vimeo, in terms of all of these  
15 cases, if you go up on a website and you see staff members  
16 putting up their own music, their own infringing music videos,  
17 well of course what's the natural inclination, the natural  
18 conclusion that you draw? But they didn't -- and those  
19 included videos by their founder, by their head of technology,  
20 by the head of the community team, by the founder of Connected  
21 Ventures. These top guys are putting up vivid music videos,  
22 infringing our copyrights by the way.

23 So what more inducement can you have? But there is  
24 more. They instructed people how to infringe. They actually  
25 gave instructions, including a couple of videos at least that

D7IBCAPC

Oral Argument

1 infringed our rights. Exhibit 53 is a lip dub, includes  
2 Smashing Pumpkins, which is an EMI song. And then on the same  
3 page, here's what they said: "Check out these lessons to learn  
4 more about how you can make videos like this one. And go to  
5 Video 101," which is their tutorial, "editing sound and music  
6 with Windows Live Movie Maker." And you go to their tutorials  
7 and they tell you to use commercial music.

8 This is an overwhelming case, your Honor, of  
9 inducement. There isn't another one out there. And I'm not  
10 finished yet. They liked, commented, talked favorably.  
11 Whether you call that knowledge or not -- and it certainly  
12 is -- a user, when he or she sees a video that has infringing  
13 music with a like or a comment, a favorable comment, by a staff  
14 member, that's inducement. That's inducement. And bearing in  
15 mind that lip dubs were their signature genre.

16 THE COURT: To satisfy Section 512(c)(1)(B), do you  
17 need to show that Vimeo induced infringement or do you need to  
18 demonstrate that Vimeo's inducement of infringement reflects  
19 its ability to control infringing context?

20 MR. FRACKMAN: If I understand, your Honor, number  
21 one, we did show that they induced infringement. But since you  
22 can't-- you don't have to tie inducement to specific  
23 infringements by parity of reasoning, you don't have to show  
24 that they induced a specific infringement. And I think we  
25 cited in our brief some authority for that.

D7IBCAPC

Oral Argument

1           The point is, as one of the courts said, maybe it's  
2           Fung, it's not the specific videos; it's the construct that  
3           Vimeo prepared and conveyed to the infringers. They conveyed  
4           the idea that this was permissible. And once you do that,  
5           you're liable for the consequences. And once the Court finds  
6           inducement, they're liable for the consequences for all of the  
7           infringements that we are able to prove because that's how they  
8           ran their website.

9           If you do whatever you can to have somebody do  
10          something, you're responsible when they do it. And when you  
11          provide the information, the tools, the location, everything  
12          that's needed to do it, you're liable for inducement.  
13          Otherwise, inducement would disappear, essentially, because you  
14          couldn't prove specific infringements. And otherwise Viacom  
15          would have said just the opposite of what the courts said. It  
16          would have said, Go back and see if you can prove inducement of  
17          specific infringements. The Court said, No, just the opposite.  
18          Because you have the right and ability to control, you're  
19          responsible for what you don't control, especially when you're  
20          inducing people to do that.

21          So I hope I answered the Court's question.

22          I would point out to the Court, as your Honor probably  
23          knows, we have in the wings either an amended complaint or a  
24          new complaint that has a thousand infringements. Many of these  
25          were staff picks or modeled on staff videos, as well as others.

D7IBCPC

Oral Argument

1 So the inducement continues, if you will.

2 THE COURT: You had asked me to tell you about time.  
3 Why don't you take just a few more minutes and then we'll hear  
4 responses from both sides.

5 MR. FRACKMAN: Okay, your Honor. So let me just  
6 finish going through inducement, because we're still not done  
7 with that.

8 Remember, they're broadcasting a message. As I left  
9 off, I think, they instructed people. They communicated, they  
10 had internal communications between themselves, among  
11 themselves, which is another way to prove inducement. They  
12 refrained from specifically saying you can't use music, even  
13 though one of their founders, Jacob Lodwick, sent a memo saying  
14 "I think the text on the upload page must say you can only  
15 upload a video if you are the copyright holder," and they  
16 decided not to do that.

17 And these are, your Honor, all in the record, but they  
18 did other things as well. When they finally-- when they  
19 started to respond to DMCA notices-- this is at SUF. 312--  
20 Somebody is asking them, Mr. Verdugo, if they can use music.  
21 And the response is, and it's typical, "Yes, you can, but if we  
22 receive DMCA takedown notices from the copyright holders, we  
23 have to comply with them." What clearer message can there be?  
24 Put it up. It will stay up as long as we don't get a DMCA  
25 takedown notice. And your Honor knows, I think from our



D7IBCPC

Oral Argument

1       briefs, how difficult it is to continue to send DMCA takedown  
2       notices.

3               They finally morphed to what they call their canned  
4       response to this question if they can use music. And, again,  
5       although they did it indirectly, and the inducement message  
6       does not have to be direct, "We cannot opine specifically on  
7       this situation you are referring to. Adding a third-party's  
8       copyrighted content to video, generally, but not always,  
9       constitutes copyright infringement. Under U.S. law, should a  
10      copyright owner come across their copyrighted content on one of  
11      our sites, they can submit a takedown notification requesting  
12      that we remove the content. This same area of law affords the  
13      operator of the site some level of protection."

14             Kind of ironic, I would think, your Honor. They're  
15      basically saying the same thing again. A little bit more  
16      verbose. Put it up. If the copyright owner sends a takedown  
17      notice... When they're told we're putting up infringing music.  
18      And there are, as Mr. Raskopf alluded to, copy after copy after  
19      copy after copy of these kinds of responses.

20             And then, finally, if I can make two more comments on  
21      inducement, your Honor. Filtering. As your Honor knows,  
22      there's no obligation to filter. But as your Honor also knows  
23      under *Grokster*, the failure to filter, especially when you're  
24      filtering lots and lots and lots of other stuff, is evidence of  
25      inducement. Selective filtering.

D7IBCPC

Oral Argument

1           And your Honor knows here they had all sorts of  
2 filters -- they're in the record -- to look at users, to look  
3 at their accounts, to look at videos, to look at television  
4 shows, to look at game playing, which they finally took off and  
5 were able to control. Taken off the system. To look at  
6 virtually everything on the system. That's why they designed  
7 it, devised it, 40 tools available only to Vimeo people. And  
8 it reviewed, by some accounts, every day or almost every day.  
9 And then, on top of that, not only didn't they design or use  
10 one of these, a keyword filter -- they used the keyword filter  
11 for movies. So they would search for *Gone with the Wind*. And  
12 if it popped up, they'd check it out. But they didn't search  
13 for Beatles. They didn't search for *White Christmas*. Maybe  
14 they did, because that's a movie also. But they could have  
15 easily done it, as our expert says. Our expert -- and they  
16 don't have an expert. The reason they don't have an expert is  
17 we took his deposition and he was able to determine at his  
18 deposition several recordings, at least one Beatles recording,  
19 using an app on an iPhone, on Vimeo. But in addition to that,  
20 we know that they spoke to Audible Magic, a well-known content  
21 filterer, used and referred to in other cases, they didn't want  
22 to pay the money for it.

23           THE COURT: But do you think that it was Congress's  
24 intention to penalize a website's development of sophisticated  
25 tools that stopped some incident of infringement just because

D7IBCPC

Oral Argument

1 it doesn't do enough? I mean, isn't that your argument? It  
2 does some, but it doesn't do enough?

3 MR. FRACKMAN: They're not developing it to stop  
4 infringement. They're developing them, by their own testimony,  
5 to mold their website. They are using these not for the  
6 purpose of stopping infringement. It's all part of their game  
7 plan to build a website that has commercial music on original  
8 videos. And when you do that -- and the cases are clear. What  
9 they say in some of the documents, we're straight-out  
10 controlling. We're fascist. We're editorializing. That's  
11 what they're using these for. But they could have used them to  
12 locate music.

13 And the cases are clear, going back to *Grokster*, I  
14 believe, in the Supreme Court, that the failure to implement  
15 the filtering tool is evidence of inducement. It's not  
16 inducement in and of itself. Under these circumstances, where  
17 they had all these other tools to use for their own purposes,  
18 where they could have been adopted and adapted to get music,  
19 that's evidence of inducement.

20 And then I could go on and on, your Honor. I'll make  
21 one other point, I think, which maybe at the end of the day is  
22 a minor point that I missed, but it sort of seals the deal in  
23 my view. They had an award, Vimeo awards that they advertised,  
24 they put out a press release. It's in the record. It was a  
25 big deal called "Captured," was the award. It was our music.

D7IBCPC

Oral Argument

1 They put up for a public award our music. Inducement.  
2 Inducement. I don't know any other word that you could use to  
3 characterize it. You see Vimeo itself nominating for an award  
4 an infringing video.

5 And then there is one final thing, and that's what the  
6 courts also talk about, and that is inducement when a website  
7 capitalizes on taking infringing customers away from another  
8 website. In their internal documents, it's Exhibit 376, under  
9 "Themes and Trends," they say, "People want an alternative to  
10 YouTube for a variety of reasons, and Vimeo is showing early  
11 signs of capturing the defections."

12 Well, I'll tell you, at least in part, why they  
13 captured the defections. Exhibit 28 to my declaration is an  
14 infringing video. It's part of 28. I stand corrected. An  
15 infringing video, infringing our music. And here's what the  
16 user said: "Can't think of a title. Number 15 [bracket]  
17 blocked by YouTube because of copyrights from EMI."

18 Here's another one that's ours: "It was originally  
19 made for YouTube, but since YouTube doesn't allow EMI music and  
20 videos, I couldn't upload it."

21 And then, finally-- and these are examples, your  
22 Honor-- "Copyrights are stupid. This video was supposed to go  
23 to YouTube, but it deleted the song so it's going here now."

24 I have a lot more to say, but at the risk of  
25 overstaying my welcome, I'll sit.

D7IBCPC

Oral Argument

1 THE COURT: Thank you, Mr. Frackman.

2 Mr. Raskopf, any response?

3 MR. RASKOPF: Yes. Thanks, Judge. I'm going to be  
4 very, very brief. I know the Judge wants me to be brief, and I  
5 will be. I'm just going to touch the clips in suit issue and  
6 turn it over to Rachel to deal with this *Grokster* thing that  
7 has been brought to the floor by Russ.

8 The case on the clips in suit is dead on arrival, as I  
9 believe has now been made obvious here, because the music-- we  
10 have videos here with some music on them. The test is whether  
11 the music on the video is blatantly or obviously infringing  
12 upon mere inspection. That's the question. And none of these  
13 are like that. None of these videos are like that.

14 The big thing that they talk about is lip dubs? I'd  
15 like to see the case that says that a lip dub infringes  
16 copyright rights, the music -- the copyrighted music. There is  
17 no case. As far as I'm aware, there is none. And they didn't  
18 cite you a case for that because when music is put into a  
19 video, well, the music is transformed. It tells a different  
20 story. This is copyright Fair Use 101.

21 Now, the question whether a particular case winds up  
22 infringing or not is not Vimeo's problem. That's a problem  
23 between the plaintiff and someone who uploads that video. The  
24 infringement-- the test for Vimeo is whether that infringement  
25 is blatant or obvious.

D7IBCPC

Oral Argument

1 In the Cheah declaration, we take down -- we show you  
2 examples of taking down videos that don't look right to us,  
3 that are obviously infringing even without a DMCA notice. But  
4 this is not-- we just do that as a matter of course. That's  
5 Cheah, Supplemental Cheah 3.

6 So what I'm here to tell your Honor is that this is a  
7 very carefully constructed statute and it's been very carefully  
8 and well-interpreted by the Second Circuit in Viacom. Let's  
9 have in mind that a service provider-- a safe harbor cannot be  
10 conditioned upon a service provider monitoring its service or  
11 affirmatively seeking facts indicating infringing activity.

12 So this is how-- so the Second Circuit understands the  
13 ISP's obligations, takes common law rights and articulates them  
14 in a way that makes sense given the fact that there's only so  
15 much that an ISP is supposed to do in order for it to function  
16 the way Congress intended it to function. And in that range of  
17 activities, there's a limited role in which we might have some  
18 issue, which does not appear here because any specific clip has  
19 to be, upon mere inspection, blatantly or obviously infringing.

20 They don't show you one of those. There isn't one.  
21 And that's all they have, as I told your Honor, is, at complete  
22 best: We may have seen a video. That's it. And discovery's  
23 over. I don't have to put in an affidavit. I don't have to  
24 say anything. Okay? The best, all they have for any one of  
25 the 55 videos is we commented, we liked. Whatever. That's it.

D7IBCAPC

Oral Argument

1 That's the whole case. And that is a complete failure, which  
2 is why we're now talking about likening Vimeo to the *LimeWire*  
3 *Grokster* line of cases. And I'm pleased to allow Rachel to  
4 deal with that question.

5 Thank you for allowing us all this time. I appreciate  
6 it, Judge.

7 THE COURT: Thank you.

8 MR. RASKOPF: Yes.

9 MS. HERRICK KASSABIAN: I'll now say good afternoon.  
10 I'll try to be brief, your Honor. Mr. Frackman has covered a  
11 lot of territory here.

12 I guess we'll start with the inducement theory of  
13 right and ability to control. I'd note that I think everything  
14 we heard from Mr. Frackman was about comments on using music.  
15 And, again, the fundamental failure of that argument is that  
16 music does not equal infringing music. They are two very, very  
17 separate things. There's nothing wrong with using music or  
18 other creative content. There's a problem with using  
19 infringing music or creative content. We didn't hear anything  
20 suggesting that that is what Vimeo is encouraging users to do.  
21 Telling someone how to sync an audio file with a video file is  
22 not an act of infringement, nor is it an act of encouraging  
23 others to infringe.

24 Now, Mr. Frackman read from the greatest hits, this  
25 handful of stray comments in six or seven e-mails that were

D7IBCPC

Oral Argument

1 submitted with the briefs regarding one-to-one e-mail  
2 conversations between a Vimeo staffer and an individual. So  
3 all of those comments put together relate to six, seven videos  
4 out of 45 million that have been on Vimeo. That is not  
5 inducement. That is not *Grokster*.

6 I believe I also heard Mr. Frackman say any time  
7 there's an encouragement to use music, it must be an active  
8 inducement because major recording artists don't license their  
9 music. It must be an infringement. And of course we know  
10 that's not true, but it's not just a matter of common sense.  
11 Exhibit 7 to the Cheah declaration attaches a number of counter  
12 notices where, upon ordinary inspection, if Mr. Frackman were  
13 correct, you might say, Well, gosh, there's a video of Kanye  
14 West, for example. The user name doesn't say Kanye West.  
15 Maybe that's not authorized.

16 Of course that's not the standard. Vimeo got a  
17 counter notice in response to a takedown demand sent about a  
18 Kanye video. The counter notice was from a man named Nabil who  
19 said, Hold on a second. I'm the director. I have a right to  
20 display that video. And then I believe he even went and got a  
21 letter from Kanye or from the recording company. So that's  
22 Exhibit 7 to the Cheah declaration.

23 There are a number of examples where commercial music  
24 was used in the video, was taken down, and we received a  
25 counter notice saying, Put it back up. We have rights.



D7IBCPC

Oral Argument

1 I believe-- I'm going to try to stay in order here, on  
2 right and ability to control. I'll come back to financial  
3 benefit, because I believe Mr. Frackman switched back and forth  
4 between those two. He said, Vimeo built it's website on lip  
5 dubs. First of all, as Mr. Raskopf explained, a lip dub is not  
6 a dirty word. It is not an active infringement, per say. And  
7 there's also no evidence in the record that Vimeo built its  
8 website on lip dubs. I'm not sure where he got that.

9 I believe I also heard Mr. Frackman says Vimeo looks  
10 at every video, and that is also incorrect. There's no  
11 evidence in the record of that. And we know, again, that there  
12 are 43,000 videos uploaded per day. Vimeo does not review  
13 every video.

14 I believe I also heard Mr. Frackman say there's no  
15 evidence of what Vimeo employees saw when they looked at-- or  
16 assuming they looked at certain videos that were tagged. Well,  
17 we, Vimeo, did not depose Vimeo employees. The plaintiffs did.  
18 And they didn't get any testimony confirming or suggesting that  
19 anything that any employee saw, that they knew or understood  
20 that to be infringing. So that means there's no evidence in  
21 the record of that.

22 That was to your question of whether, is there a  
23 question of fact here on these issue or not? There's not  
24 because there has to be a disputed fact to send to the jury.  
25 You cannot send a case to the jury on pure speculation as to

D7IBCPC

Oral Argument

1 what might have been in the minds of Vimeo employees when they  
2 allegedly tagged a video or liked a video. You have to have  
3 competent evidence to give that jury so that there's something  
4 to resolve. And there's just no evidence on their side on the  
5 issue of knowledge.

6 I also believe I heard Mr. Frackman say-- sorry, that  
7 was me -- once you start monitoring, you can't stop. So if you  
8 do a little bit of monitoring, then that suggests that you have  
9 the right and ability to control. And, again, that's a  
10 nonstarter because we know that there is no obligation to  
11 police, and right and ability to control means doing something  
12 other than removing ex post anything that you might see on the  
13 site that is alleged to be infringing.

14 And we also note that Viacom rejected that exact same  
15 argument. This is the remand decision from the district court  
16 in April of this year. Viacom made this same argument. They  
17 said, well, YouTube disabled community flagging for  
18 infringement and they declined to develop a feature to send  
19 automated e-mail alerts to copyright owners when illegal  
20 content was uploaded. And they eventually stopped monitoring  
21 their site for infringements. Instead, waiting until YouTube  
22 received a takedown notice from the actual copyright owner  
23 identifying a specific infringing clip by URL and demanding its  
24 removal from the site. So that was what Viacom argued and the  
25 Court rejected it.

D7IBCPC

Oral Argument

1           That evidence, the Court said, proves that YouTube,  
2           for business reasons, placed much of the burden on Viacom and  
3           the other studios to search YouTube-- the other studios to  
4           search YouTube 24/7 for infringing clips. That is where it  
5           lies under the safe harbor. But the Court made short work of  
6           that argument and went on to say "YouTube's decision to  
7           restrict its monitoring efforts to certain groups of infringing  
8           clips, like its decisions to restrict access to its proprietary  
9           search mechanisms, does not exclude it from the safe harbor  
10          regardless of its motivation."

11           In other words, if a service provider decides to be a  
12          good internet citizen like Vimeo and like YouTube, it makes  
13          efforts to try to combat infringement whatever way it can,  
14          whether it be through some filtering or some automated tools to  
15          catch full-length, you know, 30-minute clips that are probably  
16          sitcoms or something like that. That does not defeat safe  
17          harbor. You don't punish that conduct; you reward it.

18           Next Mr. Frackman said-- I believe you asked a  
19          question, your Honor. He read an e-mail from Dalas Verdugo  
20          saying not that you can commit infringement, but simply saying  
21          you can use music if you want.

22           And you asked, Well, did Mr. Verdugo upload one of the  
23          199 videos? Did he have anything to do with those?

24           And the answer to your question is, No, he did not.

25           And, again, I point out the question to Mr. Verdugo

D7IBCPC

Oral Argument

1 was, Can I upload music? Not Can I infringe? Or, I don't have  
2 rights; is this okay? I don't think this is a fair use; can I  
3 do this anyway? I'd like to infringe on your website. There's  
4 no evidence like that in the record. Explaining how to use  
5 music is not the same as fostering or encouraging infringing  
6 music.

7 I'll also point out that none of the 199 videos have  
8 any connection with the six or seven stray e-mails that Mr.  
9 Frackman quoted into the record.

10 THE COURT: Just back to the Verdugo e-mail for a  
11 minute. What it says is "Hey, guy, I see all the time at" --  
12 there's a misspelling, but -- "Vimeo videos, (for example lip  
13 dub) music being used that is copyrighted. Is there any  
14 problem doing this? Can I do it? Thanks."

15 Answer is, "We allow it, however if the copyright  
16 holder sent us a legal take down notice, we would have to  
17 comply. Best wishes."

18 Suggesting that you can go ahead, even if it's  
19 copyrighted, but we're only going to do something about it if  
20 we get a legal takedown notice.

21 MS. HERRICK KASSABIAN: Well, the DMCA does set forth  
22 the notice and takedown procedure, and that comment alone does  
23 not in any way endorse or support any active infringement. If  
24 the user uploaded a video that was clearly infringing and  
25 somebody saw it and satisfied, you know, the red flag test,

D7IBCPC

Oral Argument

1 then it would have to come down. But everything he said there  
2 is true --

3 THE COURT: But if a video with infringing music had  
4 been uploaded after this e-mail, would Vimeo have been  
5 willfully blind or on red flag notice?

6 MS. HERRICK KASSABIAN: Definitely not because  
7 copyrighted music, again, does not equal infringing music. For  
8 instance, it could be that this fellow went and created a video  
9 with a three-second de minimis sampling of the intro to a song  
10 or something like that. Well, of course, de minimis use of a  
11 copyrighted work is not infringement. And there obviously  
12 could also be a fair use. It could be a longer clip, but  
13 clearly used for parody or satire or something else.

14 So, no. Telling someone, you know, yes, that you can  
15 use copyrighted music is not inducement to infringe. Moreover,  
16 again, we're talking about a handful of stray e-mails and what  
17 the plaintiffs are trying to suggest is that that's the real  
18 policy. Not everything that's on Vimeo's website, not their  
19 standard response that they send to the hundreds or thousands  
20 of people whose videos get blocked in response to a takedown  
21 notice, not the terms of service that have been published on  
22 the website for the last seven, eight years. That's not the  
23 policy. It's this random e-mail from Dallas Verdugo in 2008.  
24 That's the real policy. And that's just not reality. That's  
25 not what the record shows. That is not sufficient to create a

D7IBCAPC

Oral Argument

1 triable issue.

2 We know what Vimeo's policy is. It's stated all over  
3 the place. Mr. Frackman read an excerpt from the canned  
4 response, the standard response that Vimeo sends in response to  
5 questions like this. Dallas's was a stray comment. I don't  
6 think there was anything wrong with it, but it was a stray  
7 comment. The official policy is, I believe, Exhibit 1 to the  
8 Cheah declaration. And Mr. Frackman read-- to the Supplemental  
9 Cheah declaration. Mr. Frackman read part of it, but then he  
10 stopped, so I'd like to read the whole thing.

11 He read you the following part: "Under relevant U.S.  
12 laws, should a copyright owner come across their copyrighted  
13 content on one of our sites, they can submit a takedown  
14 notification requesting that we remove the content. This same  
15 area of law affords the operator of the site some level of  
16 protection from claims of copyright infringement when dealing  
17 with user-generated content." That's where he stopped.

18 Let me keep reading. "The same protection does not  
19 apply to the actual poster of the content."

20 So Vimeo's official policy is to tell users, Don't do  
21 it. You don't get safe harbor. You are not an ISP. That is  
22 the opposite of inducement.

23 And I believe I also heard Mr. Frackman say that,  
24 well, all of the filtering tools that Vimeo uses, they don't  
25 use that to combat infringement. They use it for some other

D7IBCPC

Oral Argument

1 purpose. I don't quite understand that part of his comment.

2 But the first part of his comment is incorrect.

3 Mr. Pile submitted a declaration on our motion.  
4 Paragraph 24 says "Vimeo removes videos that violates the terms  
5 of service to set an example for users and demonstrate that  
6 Vimeo takes these policies seriously." And there he's talking  
7 about the filtering tools in paragraph 24 that Vimeo uses that  
8 filter out things like full-length movie clips and television  
9 shows, because they tend to be an exact certain length and so  
10 automated filters can sometimes find those and filter them out.

11 Again, that's what a good internet citizen does. It's  
12 not -- the act of making some attempt to combat infringement on  
13 your system without waiting for a DMCA notice is not a basis to  
14 deny safe harbor.

15 THE COURT: The response that you read in Exhibit 1,  
16 how long has Vimeo been providing that response?

17 MS. HERRICK KASSABIAN: The one I'm holding here, your  
18 Honor, is from April of 2009.

19 THE COURT: Right. I see that. But you said that  
20 this is-- I believe you described it as a canned response of  
21 some sort.

22 MS. HERRICK KASSABIAN: Okay. Your Honor, I believe  
23 that if you look at all 80 examples in supplemental Cheah  
24 Declaration Exhibit 2, you'll see this response going back to  
25 the middle of 2008. There are 80 different instances.

D7IBCAPC

Oral Argument

1 I would also direct you, again, on the issue of what  
2 is Vimeo's policy with respect to music to supplemental Cheah  
3 Declaration Exhibit 2. Again, not a random, stray e-mail from  
4 five years ago from Mr. Verdugo, but rather to Vimeo's posted  
5 policies. And Exhibit 2 says: "Are we allowed to have music  
6 in our videos?" And then it explains Vimeo's policy, but  
7 obviously infringing music is not allowed. It's not to say no  
8 music is allowed. That's not Vimeo's policy, nor does it need  
9 to be. Infringing music is not allowed.

10 So that would be, again, the fact that what Vimeo has  
11 submitted is affirmative and overwhelming evidence of its  
12 policies on its website, in e-mails, et cetera. A random,  
13 stray e-mail here and there from an employee who maybe didn't  
14 quote it just right or didn't get it just right does not create  
15 a triable issue as to what Vimeo's policy was. In further  
16 support, obviously, is the extensive record of takedowns in  
17 this case enforcing that policy.

18 THE COURT: And how long has this answer effectively  
19 been up on the website?

20 MS. HERRICK KASSABIAN: Exhibit 2? I'll have to check  
21 with my team on that, but I do see that obviously the print  
22 date on this page --

23 THE COURT: No, I see the date. I'm just wondering  
24 how long this-- it's phrased as an answer -- but how long this  
25 answer or policy has been up on the website.



D7IBCPC

Oral Argument

1 MS. HERRICK KASSABIAN: Okay. My understanding is  
2 it's about the middle of 2008. It's about the same time period  
3 as the canned response that we talked about in Supplemental  
4 Cheah Declaration Exhibit 1.

5 You also asked a question of Mr. Frackman, your Honor.  
6 You said, Do you have to show that the inducement influenced  
7 the right and ability to control, or do you just have to show  
8 inducement?

9 And, you know, the answer is, of course, the former.  
10 This is not a merits motion. We're not moving on liability.  
11 The plaintiffs are not here presenting their case in chief on  
12 their claims of inducement on the merits. Rather, we're just  
13 talking about DMCA safe harbor and the Second Circuit's opinion  
14 that, depending upon the circumstances, you might be able to  
15 show right and ability to control if you see the type of  
16 conduct that we saw in *Grokster*: Active inducement of  
17 infringement, where you are actually participating in the  
18 creation of this content through advice, through encouragement,  
19 through direction, or what have you, but it's infringing. Not  
20 just advice on content, but advice to infringe.

21 There's no evidence of that here. Everything we've  
22 heard talks about a handful of stray e-mails talking about,  
23 again, six or seven videos out of the 45 million, that's what  
24 they came up with in opposition to our motion where there's  
25 some advice about using music. No advice about infringement.

D7IBCAPC

Oral Argument

1 I'm just trying to make sure I covered everything,  
2 your Honor. I think those are all of Mr. Frackman's points on  
3 inducement.

4 So I can move on to, just quickly, financial benefit  
5 unless your Honor has any other questions--

6 THE COURT: No, thank you.

7 MS. HERRICK KASSABIAN: -- on inducement.

8 Oh, sorry, I have one last point about the music  
9 equals infringement paradigm which I believe is not supported  
10 by the case law or the facts.

11 And I mentioned earlier that, again, to Mr. Frackman's  
12 comments that, well, if there's commercial music, it must be  
13 infringing. Not only is that, I don't think, supported by  
14 logic, but I mentioned also that the Shelter Capital Ninth  
15 Circuit 2013 decision made reference to this argument that UMG  
16 had made in that case. And the Court said, "As an initial  
17 matter, contrary to UMG's contentions, there are many music  
18 videos that could, in fact, legally appear on Veoh. Among the  
19 types of videos subject to copyright protection but lawfully  
20 available on Veoh's system were videos with music created by  
21 users and videos that Vimeo provided pursuant to arrangement."

22 So just the point being that, again, this notion that  
23 lip dubs or videos with some music must be infringing is just  
24 not supported by the case law or the record here.

25 And just lastly, quickly, your Honor, on direct

D7IBCPC

Oral Argument

1 financial benefit, Mr. Frackman made a couple of points. He  
2 said advertisements are targeted to websites. I believe the  
3 record on that issue is in the Mellencamp declaration,  
4 paragraph 8, which says, "other Than Vimeo's home page and the  
5 video upload page, display advertisements are not targeted to  
6 specific pages but are placed wherever there is available  
7 inventory on Vimeo pages." So that's the evidence in the  
8 record on whether there's some connection between the  
9 advertising and whether or not a video might be infringing.

10 He also mentioned lip dub sponsorship. CarMax  
11 sponsored a lip dub channel or promotion or something like  
12 that. Again, that's not relevant because lip dubs do not equal  
13 infringement. So whether or not there might have been some  
14 revenue tied to a lip dub promotion is not revenue tied to an  
15 act of infringement. We all know that lip dubs could be  
16 authorized, could be used in public domain music, could be a  
17 fair use, could be de minimis. It does not equate to  
18 infringement, your Honor.

19 And I think that covers it unless you have any other  
20 questions.

21 THE COURT: No. Thank you.

22 Mr. Frackman.

23 MS. HERRICK KASSABIAN: Thank you.

24 MR. FRACKMAN: I used to have a partner, your Honor,  
25 who used to say, I could call it a ham sandwich, but it would

D7IBCPC

Oral Argument

1 still be the same thing. And that's exactly the argument we're  
2 hearing now. It might not be infringing. It's not infringing  
3 music. Well, it becomes infringing music when it's used  
4 without consent. And this is infringing music.

5 It's not, as the Veoh Court referenced, user music.  
6 There's not a bit of music that a user made up any of this  
7 music. The evidence is all to the contrary. It's not like  
8 Veoh said that Veoh may have done it pursuant to an  
9 arrangement. I believe it was an arrangement with another  
10 record company, Sony BMG. They don't license it from any  
11 record companies. So they don't have those outs here if they  
12 are, indeed, outs.

13 A couple of other points. This construct -- and we've  
14 done it in our reply, so I don't want to belabor it.  
15 Mr. Pile's construct that we now have takedown music because of  
16 a DMCA policy or a non-DMCA policy is just wrong. Their real  
17 position, repeated over and over again in the depositions, and  
18 it's in our brief, is, for example, Andrea Allen:

19 "Q. "So the policy was to permit any music, any copyrighted  
20 music, to be used on videos as long as the user created the  
21 video portion. Correct?

22 "A. Yes, unless we receive the DMCA takedown notice."

23 So that was their policy. They got nervous at the end  
24 of this motion period and they put in Mr. Pile's declaration.  
25 If you look at the exhibits, they don't prove-- Mr. Cheah's

D7IBCAPC

Oral Argument

1 declaration, I should say. The exhibits, if you look at  
2 them -- and we tried to point that out -- don't prove what he's  
3 saying or what counsel is saying.

4 They had one policy, and that policy was original  
5 video copyrighted music. And that comes across over and over  
6 again. And that's why, among other things, the tools that they  
7 used, the tools that they used, are important. And that's why  
8 filtering is important here. They were filtering to make up  
9 their-- to build up their brand, as they put it. And their  
10 brand was original video copyrighted music. And they did it in  
11 a whole number of ways. And they started out-- I won't get  
12 into that.

13 The phrase "a few stray e-mails" I think resonates,  
14 because I think it's in one of the other cases. It may be  
15 *Fung*, it may be *LimeWire*, and it was discounted by the Court.  
16 Because one way to show intent is internal e-mails; one way to  
17 show intent are e-mails with users.

18 So among the exhibits, which I didn't have a chance to  
19 get to, are e-mails in community forums that are available to  
20 all their-- I don't remember what they said-- 20 million users.

21 THE COURT: What's that exhibit number?

22 MR. FRACKMAN: I'm sorry?

23 THE COURT: Is there an exhibit number for that?

24 MR. FRACKMAN: Yes. I'll give you a few exhibit  
25 numbers. Exhibit 162, Community Forums. Question was "I was

D7IBCAPC

Oral Argument

1 wondering if it's possible to legally use copyrighted music if  
2 you put it in a private channel," which of course it isn't.  
3 And which, of course, comes back to a question your Honor  
4 asked, which is, willful blindness includes letting people put  
5 stuff in a private channel.

6 Andrea Allen, one of their people-- I'm sorry, Julia  
7 Quinn, one of the people whose music was taken down pursuant to  
8 a takedown notice, moved it to a private channel. We only  
9 found that out when we got their database.

10 But, anyway, Exhibit 162 is an example: "I was  
11 wondering if it's possible to legally use copyrighted music if  
12 it's private invite channel?"

13 "Technically no, but I'm sure the FBI won't be busting  
14 down your door anytime soon. There are too many people doing  
15 it for it to be enforced unless it's being used for commercial  
16 purposes." 162. To everybody.

17 User forum, Exhibit 29 to Mr. Lodwick. User posted a  
18 forum question: "I know you guys haven't been living under a  
19 rock, so I was wondering what is the risk of having lip dubs be  
20 included in 'Vimeo Obsessions' because they are technically  
21 copyright infringement."

22 Vimeo never answered that one.

23 Your Honor, there are others. They're all in the  
24 record.

25 One more that I found on the forum, a question: "I

D7IBCAPC

Oral Argument

1 uploaded a video to YouTube which is blocked at my school and I  
2 am showing it Wednesday. Vimeo isn't blocked so I'm going to  
3 use this instead. Plus the quality and everything else means I  
4 would use Vimeo anyway, but it has 'Don't Stop Me Now' in the  
5 background. Goes brilliantly with the video."

6 Answer by staff: "You can use the music. There are  
7 tons of videos on here with music. Just be sure to mention the  
8 artist, especially if it's something educational."

9 So while my colleague is looking, I'll make another  
10 point.

11 In an interview that, I believe it's Mr. Whitman gave,  
12 a request for judicial notice, Exhibit 1, he says, 'We got  
13 hundreds and hundreds of resumes,' Lodwick says. He's talking  
14 here about-- the article is about lip dubs. "'We've got  
15 hundreds and hundreds of resumes,' Lodwick says." It put us on  
16 the map because you wouldn't expect a company to produce  
17 something like that." And he is talking about lip dubs. And  
18 it did put them on the map.

19 Another forum question: "I'd like to have a feature  
20 like the cast of One, but to show the tracks used as soundtrack  
21 on the clips." Mr. Lodwick responds, "Good idea. For now just  
22 tag the clip with the music, the Beatles, or Music Beck or  
23 whatever."

24 And then, finally, your Honor, on the home page-- and  
25 there are more, but I know it's getting late. On the home

D7IBCAPC

Oral Argument

1 page, lip dubbing became, on the home page, a Vimeo obsession,  
2 which are put on the home page, where they feature what they  
3 want to feature. And it says "Lip dubbing. Like a music  
4 video. Shoot yourself mouthing along to a song, then sync it  
5 with a high-quality copy of the song in an editing program."

6 And then finally, your Honor, all of these videos, all  
7 of these videos that they didn't take down on their own  
8 volition, all of these videos that they put up, all of these  
9 comments, went to their millions and millions of users. On the  
10 199 recordings on this schedule, they were viewed nine and a  
11 half million times. Oh, I'm sorry, 950,000. Wishful thinking.  
12 950,000 times. On the ones on the new schedule that are  
13 infringing, I believe it was two million times. These are not  
14 stray e-mails. They show what they're communicating  
15 internally; what they're communicating outside.

16 By the way, your Honor, the Google ads, AdSense, which  
17 are one of the ads, type of ads, that are placed on the page,  
18 are textual in nature. That's what Google AdSense is. So  
19 there are ads that are not textual; there are ads that are  
20 textual. At the end of the day, it doesn't really matter.  
21 They both bring in money to Vimeo.

22 THE COURT: Any final remarks?

23 MR. FRACKMAN: I'm sorry?

24 THE COURT: Any final remarks?

25 MR. FRACKMAN: Yes, your Honor. Two things, or three



D7IBCAPC

Oral Argument

1 things. I'm not sure where this blatant and obvious language  
2 comes from. I don't think it comes from the Viacom case in  
3 terms of knowledge. I think you have to have specific  
4 knowledge of the infringing videos. At least I didn't see it  
5 again when I took a look. But I'm not sure in the context here  
6 that it makes any difference.

7 I don't want to get into the repeat infringer policy.  
8 We spell it out in our papers. Your Honor asked some  
9 questions. I don't think you got answers. And I think it's  
10 pretty clear that they didn't have a "three strikes policy"  
11 until November of 2008, when they invented Purgatory. And they  
12 didn't have a written repeat infringer policy until, I think,  
13 2011.

14 And, indeed, when two people who should know,  
15 Mr. Lodwick and Mr. Verdugo, were asked at their deposition  
16 about an infringer policy, one said "I don't know of any" and  
17 the other one said "I don't know of anything in writing." It's  
18 a strange policy to begin with, as your Honor knows, and I  
19 don't think it's duplicated anyplace else. It's unusual in its  
20 leniency.

21 As we spell out in our papers, they also didn't  
22 expeditiously remove. By the way, they keep saying  
23 expeditiously remove after DMCA notice. That's not what the  
24 statute says. Expeditiously remove after knowledge, not DMCA  
25 notice. And we've shown you they've had knowledge of these

D7IBCPC

Oral Argument

1 things for years and years and years, including the stuff they  
2 put up. That's expeditious removal.

3 When it comes down to it-- and I just want to make one  
4 final point that's argued in the brief, but obviously a new  
5 case since we argued it. And that's on the pre-'72 sound  
6 recordings. And your Honor probably knows of the Escape Media  
7 case, which I think puts an end to that argument. I think we  
8 have, I don't remember, but your Honor's schedule, maybe 20  
9 including very, very valuable recordings of the Beatles that  
10 are pre-'72 recordings.

11 And the Escape Media case, understanding that it  
12 disagrees with MP3.com, but what it does is talk about the  
13 strict language of the copyright statute. And, frankly,  
14 pre-'72 recordings do not fall under the DMCA because they're  
15 not federally copyrighted recordings anymore than I could stand  
16 here and ask your Honor for statutory damages for pre-'72  
17 recordings because they don't fall under the Copyright Act.  
18 And the Escape Media case cites to the copyright office study,  
19 and I think quotes it, which in no uncertain terms says we  
20 think MP3.com is wrong.

21 So I would submit that those pre-'72 recordings as a  
22 matter of law should be carved out and we're entitled to  
23 summary judgment on those as well.

24 So just to conclude, your Honor, we're not asking that  
25 Vimeo go out of business. We're asking that they do what

D7IBCPC

Oral Argument

1 YouTube now does, what Veoh now does, what pretty much  
2 everybody else now does, which is pay for their music. And  
3 they can do it, they can find it, or they can block it. There  
4 are all sorts of things they can do. But when you come to the  
5 end of it, there are two principles: Number one, they set out,  
6 unlike any other website -- unlike Veoh, unlike YouTube -- to  
7 build a certain type of website and they built it in part on  
8 the backs of copyrighted music that they didn't pay for.

9           Number two, when you parse through, I would suggest,  
10 the argument that counsel has made, the argument is an ISP can  
11 never be excluded from safe harbor. They can't be excluded  
12 because they'll never know. They can't being excluded because  
13 they'll never be willfully blind. They can't be excluded  
14 because they can't induce specific infringements. They can't  
15 be excluded because it may be licensed or it may be fair use.  
16 And that's just not what the law is.

17           Thank you, your Honor.

18           THE COURT: Thank you.

19           I'd like to thank all of the lawyers for their  
20 excellent advocacy here today and in the briefs and I will  
21 reserve decision.

22           Thank you. Have a nice day.

23           MR. FRACKMAN: Thank you, your Honor.

24           MR. RASKOPF: Thank you, your Honor.

25           (Adjourned)